United States Court of Appeals

for the Second Circuit

APPENDIX

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74-1327

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1327

UNITED STATES OF AMERICA,

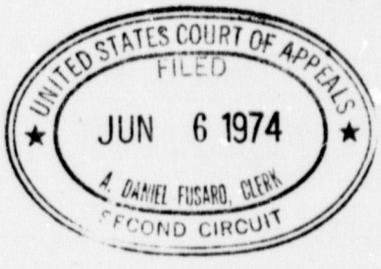
Appellee,

--against—

VINCENT PACELLI, JR., et al.,

Appellant.

APPENDIX FOR APPELLANT VINCENT PACELLI, JR.



STEVEN B. DUKE
Attorney for Appellant Pacelli
127 Wall Street
New Haven, Conn.
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73-1277

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	
BENJAMIN MALLAH,	:	
VINCENT PACELLI, JR.,		
ALFRED CATINO, a/k/a "Herbie",	:	
ALFRED DE FRANCO, a/k/a "Skinny",		INDICTMENT
BARNEY BARRETT,	:	
ISMAEL TORRES,		S 73 Cr. 881
PETER SALAMARDI,	:	
COURTLAND SAMPLE, a/k/a "Bucky",		
ALBERT PEREZ, a/k/a Abbe Perez,	:	
AL BRACER,		
EDGARDO RAMIREZ,	:	
JACK SPADA, and		
JOHN FAZZALARI, a/k/a "Fuzzy",	:	
Defendants.	:	

The Grand Jury charges:

1. From on or about the 1st day of January, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, BENJAMIN MALLAH, VINCENT PACELLI, JR., ALFRED CATINO, a/k/a "Herbie", ALFRED DE FRANCO, a/k/a "Skinny", BARNEY BARRETT, ISMAEL TORRES, PETER SALAMARDI, COURTLAND SAMPLE, a/k/a "Bucky", ALBERT PEREZ, a/k/a Abbe Perez, AL BRACER, EDGARDO RAMIREZ, JACK SPADA and JOHN FAZZALARDI, a/k/a "Fuzzy", the defendants, and Herbert Sperling, Joseph Conforti, Louis Mileto and Barry Lipsky, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

9/20/73 Date Signed

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about July, 1971 the defendant EDGARDO RAMIREZ delivered two cans of lactose to 1420 Third Avenue New York, New York.

2. In or about November, 1971 co-conspirator Herbert Sperling delivered to defendant VINCENT PACELLI, JR. two kilograms of heroin.

3. In or about September, 1971 the defendant VINCENT PACELLI, JR. delivered approximately two kilograms of heroin to defendants ALFRED CATINO, a/k/a "Herbie" and JOHN FAZZALARI, a/k/a "Fuzzy".

4. In or about the month of December, 1971 the defendant VINCENT PACELLI, JR. delivered one kilogram of cocaine to the defendants ALFRED DE FRANCO, a/k/a "Skinny" and JOHN FAZZALARI, a/k/a "Fuzzy".

5. On or about August 16, 1972 the defendant BENJAMIN MALLAH had a conversation with co-conspirator Herbert Sperling in front of 844 Seventh Avenue, New York, New York.

6. In or about the month of December, 1972 the defendant BARNEY BARRETT was in the vicinity of 844 Seventh Avenue, New York, New York.

7. On or about January 10, 1973 the defendant JACK SPADA had in his possession approximately two and one-half kilograms of heroin.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about the month of September, 1971, in the Southern District of New York, VINCENT PACELLI, JR., ALFRED CATINO, a/k/a "Herbie" and JOHN FAZZALARI, a/k/a "Fuzzy", the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

In or about the month of December, 1971 in the Southern District of New York, VINCENT PACELLI, Jr., ALFRED De FRANCO, a/k/a "Skinny" and JOHN PAZZALARI, a/k/a "Fuzzy" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FOUR

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, VINCENT PACELLI, Jr., ALBERT PEREZ, a/k/a Abbe Perez and EDGARDO RAMIREZ the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FIVE

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, [redacted] and VINCENT PACELLI, Jr., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SIX

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York, [redacted] and VINCENT PACELLI, Jr., the defendants, unlawfully, intentionally and knowingly did distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

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COUNT SEVEN

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, BENJAMIN MALAMI and VINCENT PAGLILI, Jr., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT EIGHT

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, ALBERT PEREZ, a/k/a Abbe Perez, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

FOREMAN

PAUL J. CURRAN
United States Attorney

JL:js

7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	BILL OF PARTICULARS
-v-	73 Cr. 881
BENJAMIN MALLAN, et. al.,	
Defendants.	

The United States of America, as and for its Bill of Particulars herein, alleges as follows:

1. Overt Act number 1 took place in or about the month of July 1971 (exact time and date unknown). Co-conspirator Barry Lipsky was also present.

2. Overt Act number 2 took place in or about November of 1971 (exact time and date unknown) at various locations in New York City including Ballantines Barbar Shop at 844 Seventh Avenue, New York, New York and a New York City Municipal parking garage located at West 54th Street and Eighth Avenue and 55 East 9th Street.

3. Overt Act number 3 took place in or about late August or the month September of 1971 (exact time and date unknown) at various locations in New York City including a club on East 115th Street between 1st and Pleasant Avenue, at 1420 Third Avenue and in a car parked in the vicinity of 1st Avenue between 113th and 114th Streets. Co-conspirator Barry Lipsky was present at some of these times.

4. Overt Act number 4 took place in or about late November or the month of December, 1971, exact time and date unknown, at various locations in Manhattan, including a club on East 115th Street between First and Pleasant Avenues,

55 East 9th Street and in a car parked in the vicinity of about First Avenue between 90 and 91st Streets. Co-conspirator Barry Lipsky was present at some of these times.

5. Overt Act number 5 took place in the afternoon of August 16, 1972 (exact time unknown).

6. Overt Act number 6 took place in or about December 1972 (exact time and date unknown) in the vicinity of 844 Seventh Avenue including the Gold Rail Lounge.

COUNT TWO

Count Two took place in or about late August or the month of September 1971 (exact time and date unknown) at various locations in New York City including a club on East 115th Street between 1st and Pleasant Avenues, at 1420 Third Avenue and in a car parked in the vicinity of 1st Avenue between 113th and 114th Streets. Co-conspirator Barry Lipsky was also present at some of these times.

COUNT THREE

Count Three took place in or about late November or the month of December, 1971 (exact time and date unknown) at various locations in Manhattan including a club on East 115th Street between First and Pleasant Avenues, at 55 East 9th Street and in a car parked in the vicinity of about First Avenue between 90 and 91st Streets. Co-conspirator Barry Lipsky was also present at some of these times.

COUNT FOUR

Count Four took place in or about the month of October, 1971 (exact time and date unknown) at various locations in New York, New York including in the vicinity

of the Yellow Fingers Cafe, 1009 Third Avenue, New York, New York, West 55th Street and 6th Avenue, West 54th and Eighth Avenue, West 57th Street and Seventh Avenue and at 55 East 9th Street in New York City and at other locations in Manhattan. Co-conspirators Barry Lipsky, Albert Perez, a/k/a Abbe Perez, Edward Bless and Jack Bless were also present at some of these times.

COUNT FIVE

Count Five took place in or about July of 1971 in the late afternoon (exact time unknown) at various locations in Manhattan including the vicinity of Ballantine's Barber Shop at 844 Seventh Avenue, First Avenue and East 55th Street, 1420 Third Avenue, First Avenue and East 57th Street, and at other locations in New York. Co-conspirators Barry Lipsky, Herbert Sperling and Louis Mileto were also present during various times.

COUNT SIX

Count Six took place in or about the month November of 1971 (exact time and date unknown) at various locations in Manhattan, including 844 Seventh Avenue, a New York City Municipal garage at 54th Street and Eighth Avenue, at 55 East 9th Street and at other locations in New York City. Co-conspirators Barry Lipsky, Herbert Sperling and Louis Mileto, among others, were present at various times.

COUNT SEVEN

Count Seven took place in or about the month of December of 1971 (exact time and date unknown) in the vicinity of 1223 Shakespeare Avenue, Bronx, New York, 55 East 9th Street, New York, New York, a Municipal Parking Garage at

West 54th Street and 8th Avenue and Ballantines Barber Shop, 844 Seventh Avenue, New York, New York and other locations in New York City. Co-conspirators Juan Serrano, a/k/a John Negron, Barry Lipsky and Herbert Sperling, among others were present at various of these locations.

The following are names of co-conspirators not named in the indictment.

Norman Goldstein, a/k/a "Sonny Gold"
Jack Bless
Edward Bless
Nicholas Cuccinello, a/k/a "Lucky Red"
Cecile Sperling
Juan Serrano, a/k/a "John Negron,"
Frank Bassi, Jr.
Antoinette Bassi
Fred Berger
Frank Serrano
Luis Valentine, a/k/a Ramon Lombardero,
Reginald Williams
Octavio Del Busto
Nelson Garcia
Susan Ueyl
Salvatore Ruggiero
Edward Peter Schworak
John Ramos
Carlo Lombardi
John Capra, a/k/a "Hooks"
Stephen Delacava, a/k/a "Beansie"
Leo Guarino
Carlo Lombardi
Nicholas Lugo
Peter Aponte
Albert Gonzalez
Paul Carter
Mark Reiter
John Caruso

PAUL J. CURRAN
United States Attorney

By: JAMES P. LAVIN
JAMES P. LAVIN
Assistant United States Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA VS. VINCENT PACELLI, JR.	No. 73 Cr. 881 MOTION TO DISMISS INDICTMENT FOR VIOLATION OF FIFTH AMENDMENT RIGHTS

Defendant respectfully moves the court to enter an order dismissing the indictment in the instant case on the ground that:

1. Defendant testified under a grant of use immunity or, alternatively, the reasonable, justifiable belief that he was testifying with use immunity, in late July or early August, before the Hon. Milton J.Pollack, in the trial of U.S. v. Sperling, Pacelli, et al, 73 Cr. 441.

2. In said testimony, which covers pp. 3596-3643 of the transcript, and includes direct and cross-examination, defendant testified fully on all facts alleged against him in the indictment, which allegations are substantially identical to the allegations in the present indictment.

3. Defendant was induced so to testify by the court's clear indication that it was granting such immunity, as is fully set forth in the annexed affidavit, and by defendant's belief that such immunity was granted. Additionally, there was no knowing, intelligent waiver of the defendant's right not to testify, as defendant has indicated in a pre-trial affidavit that he did not want to and would not testify until and unless this case was disposed of.

4. Subsequent to the aforesaid testimony, evidence was presented to a grand jury which returned the present indictment.

5. Defendant believes and therefore alleges that the testimony was presented by an Assistant United States Attorney who was either present in

the courtroom when defendant was testifying in 73 Cr. 441 or was subsequently made aware of the substance of the testimony.

6. Defendant's indictment in the instant case was therefore obtained in violation of the use immunity granted him in 73 Cr. 441 or, if no such immunity was granted, in violation of defendant's Fifth Amendment right not to testify.

WHEREFORE, Defendant requests that the indictment against him be dismissed.

Respectfully submitted,

Steven B. Duke

November 21, 1973

Steven B. Duke
127 Wall Street
New Haven, Conn.
06520

Attorney for Defendant Pacelli

In The

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :	No. 73 Cr. 881
Vs. :	AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS FOR VIOLATION OF FIFTH AMENDMENT RIGHTS
VINCENT PACELLI, JR. :	

Vincent Pacelli, Jr., being first duly sworn, states as follows:

1. I am the defendant in the above entitled case and submit this affidavit in support of my motion to dismiss for violation of Fifth Amendment rights.

2. I was a defendant in 73 Cr. 441, tried in the United States District Court for the Southern District of New York in July and August, 1973. Said indictment was substantially identical in its charges against me to the charges in the present indictment.

3. Prior to trial of 73 Cr. 441, I prepared and executed an affidavit in which I stated that I did not intend to testify in my own defense to the charges in the indictment. I did state, however, that I was prepared to give exculpatory evidence for some of my codefendants and would testify in their defense if the charges against me were first disposed of. This affidavit was offered by some of the co-defendants in support of a motion for severance, which was denied. My motion for severance was also denied.

4. During trial, after the Government had completed its case and some of the defendants had offered evidence, the matter of my testifying was raised again. I testified, consistent with my pre-trial affidavit, that if a verdict was rendered on the charges against me, I would then testify on behalf of other defendants (Tr. 73 Cr. 441, pp. 3525-26).

5. After considering the propriety of sending the jury out twice, once on my case, then, after my testimony, for the other defendants, the court rejected this idea and the following colloquy occurred at p. 3552 of the transcript:

> THE COURT: All right. Let me ask you this question and how would the defendants' counsel consider this: suppose, as they have done in a prominent case in Washington, that there is use immunity given to Mr. Pacelli at the present time for his testimony in this case on direct and cross-examination and then he is severed out of the case. How would that work?

Mr. BALLIRO: Of course that is a matter I would have to agree with. It is consistent with my contingent motions for a mistrial and severance during the course of this trial.

THE COURT: Would you agree that Mr. Pacelli would take the witness stand to be examined and cross-examined with the understanding that he be severed from the case immediately after his testimony?

Mr. BALLIRO: Severed from his jury.

THE COURT: Yes.

Mr. BALLIRO: Yes.

THE COURT: Would you agree to that?

Mr. BALLIRO: Yes.

6. Thereafter, in reliance upon the agreement that I would receive use immunity and he severed, I was called to the stand by several defendants and testified fully on direct and cross-examination, over pp. 3596-3643 of the transcript, on all aspects of the charges against me and against many of the other defendants as well.

7. At no time did my attorney or anyone else suggest to me that my testimony in 73 Cr. 441 might be usable against me in subsequent trials or proceedings. On the contrary, I clearly understood from the colloquy between the Court and my counsel, that I was testifying under use immunity. As I indicated in my testimony and in my pre-trial affidavit, the only alternative basis upon which I was willing to testify was that my case first be disposed of.

8. Shortly after my testimony in 73 Cr. 441, my attorney, Mr. Balliro explained to me that one of the reasons he had agreed to have me testify was that I had received immunity. Another reason, though not an independent reason in and of itself, was that I was to obtain a mistrial. This was consistent with my understanding prior to testifying.

9. Since the basis for the judge's declaring a mistrial, the need for my testimony, was made plain to the court by my affidavit prior to trial, in support of motions for severance, I do not understand how I can fairly have been compelled to incriminate myself as the price of obtaining the mistrial. In any event, I had no intention of testifying without use immunity.

_____

Vincent Pacelli, Jr.

Subscribed and sworn to before me this ____ day of November, 1973.

In The
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Vs. VINCENT PACELLI, JR.	No. 73 Cr. 881 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR VIOLATION OF FIFTH AMENDMENT RIGHTS

Defendant claims that his testimony in 73 Cr. 441 was given under a grant of use immunity. The court obtained counsel's agreement to the procedure which was subsequently followed, which procedure expressly included the granting of use immunity. Whether defendant was intended by the court to receive use immunity or not, he did receive it by virtue of the agreement and defendant's reasonable understanding. Certainly no waiver of defendant's Fifth Amendment privilege can be presumed from what occured in 73 Cr. 441. Defendant had executed an affidavit indicating that he did not intend to take the stand, would do so only on behalf of others, when his case was disposed of. This intention was altered only by the court's proposal to grant him use immunity. Certainly this was an occasion, as the court indicated, when an express, on the record waiver was appropriate if waiver was later to be claimed.

Thus, defendant's testimony was obtained either under a grant of immunity or in violation of his right not to testify, which has the same practical effect: the testimony and its fruits must not be used by the Government in any way. Harrison v. United States, 392 U.S. 219 (1968).

Alternatively, defendant claims that his testimony was obtained by the court as the price of getting a mistrial, a mistrial which should not have been necessary because the grounds therefore existed and were made known to the court in advance of trial and should have produced a severance (this point is more fully argued in the memorandum in support of motion to dismiss for double jeopardy). It was thus testimony wrongfully obtained, and defendant was induced to "waive" his fifth amendment rights improperly, unfairly and unnecessarily. See Garrity v. New Jersey, 385 U.S. 493 (1967); Simmons v. United States, 390 U.S. 377 (1968).

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Where a witness has testified under a grant of use immunity or under circumstances the virtual equivalent thereof, i.e. testimony without a knowing intelligent waiver, there is a "heavy burden" on the Government to prove an independent source not only for any evidence it subsequently offers, but for the thinking processes of the prosecutor who submitted the case to the grand jury or who tries the case. United States v. Dornau, 359 F. Supp. 684 (SDNY 1973). Thus, where the Assistant United States Attorney who presented the case to the grand jury had previously read immunized testimony, the only appropriate remedy was dismissal of the indictment. United States v. Dornau, supra.

In this case, the Government must prove that neither the witnesses who testified before the grand jury nor the prosecutor or prosecutors who presented the evidence, or who interviewed the witnesses prior to presentation of the evidence to the grand jury, read the defendant's testimony in 73 Cr. 441, saw defendant testify, saw memos or reports on the testimony, or heard oral reports of the substance thereof. In the absence of such a showing it is clear that the indictment must be dismissed.

Respectfully submitted,

Steven B. Duke

November 21, 1973

Steven B. Duke
127 Wall Street
New Haven, Conn.
06520

Attorney for Defendant Pacelli

17

In The

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Vs. VINCENT PACELLI, JR.	No. 73 Cr. 881 MOTION FOR PSYCHIATRIC EXAMINATION OF BARRY LIPSKY

The defendant moves the Court for an order directing the Government to produce Barry Lipsky at a convenient time and place to be given a psychiatric examination by an expert selected by defense. In support thereof the defendant alleges that

1. Barry Lipsky is the chief, if not the sole source of the Government's case against the defendant.

2. Barry Lipsky is in custody under the substantial control of the Government.

3. Barry Lipsky is a co-operating witness for the Government pursuant to promises of immunity and other considerations made to him on diverse occasions.

4. Barry Lipsky has testified under oath that he was engaged in the wholesale narcotics business and has plead guilty in state court to the crime of manslaughter of Patsy Parks, the alleged victim in this case. According to his own statements to the authorities, Lipsky set the girl on fire, after she was doused with gasoline, and her body was burned or consumed by flame.

5. The defense is in possession of tapes and transcripts of conversations between Lipsky's attorney, Walter Gwinn, and Walter Feffer, Assistant United States Attorney. These tapes and transcripts reflect a conversation

on March 13, 1972 concerning Lipsky's mental stability and sanity. Gwinn tells Feffer he had "intended to have him [Lipsky] examined by a whole batter of psychologists..." and Feffer responded, "I don't think he was nuts." Gwinn responds, "I know that there's something wrong with him. I do not know that he is beastly insane." Feffer replied, "Yea, he [the Nassau County D.A.] can't use a screwball." Gwinn: "He can't use a screwball. On the other hand, if [The D.A.] doesn't want to use him, I may have to have a screwball defended." (pp. 2-3 of transcript, attached). Later in the conversation, Gwinn refers to his client Lipsky as "a dummy" and "weird." (p. 5). Subsequently, on May 23, 1972, the subject was renewed. Gwinn said that Lipsky was becoming "edgy" and Feffer agreed, saying "its more noticeable." Gwinn said he was concerned about Lipsky's "emotional stability" and Feffer agreed. Gwinn added, "this man's capable of going crazy as hell...If he's gonna be any good, he's got to be competent." (pp. 38-39).

6. Thereafter, Mr. Gwinn filed an affidavit in the Nassau County Court, on December 6, 1972, swearing that Lipsky did not understand "willingness" and "free and voluntary," that he was not competent to testify, that his mother had attempted unsuccessfully to have him examined by psychiatrists, that Lipsky fired a gun into a television set to silence the announcer, threw two scales into the Atlantic because they refused to reveal that Lipsky had lost weight. A copy of that affidavit is attached.

7. At the trial of United States v. Pacelli et. al, 72 Cr. 664, Lipsky admitted that he had once visited a psychiatrist at the urging of his mother (Tr. 291), had "banged my hand against the wall" (Tr. 292). Counsel was not permitted to get an answer to the question whether Lipsky had ever shot out the screen of a TV set with a hand gun because he was disturbed with the program (Tr. 292).

8. Lipsky has admitted under oath that he used cocaine from 1967 until 1972. See Tr. p. 1189, 1328-29, 73 Cr. 441.

9. Lipsky has also admitted under oath that he is particularly fond of horror programs, has made faces while watching them and has even adopted the name "Mr. Graves," of a personality on one of his favorite horror shows (Tr. p. 1196, 1305-7, 73 Cr. 441).

10. Lipsky has been imprisoned, allegedly in fear of his life, since March 3, 1972, a lengthy period of great stress.

11. As is more fully set forth in Duke's affidavit in support of motion for inspection of grand jury minutes, Lipsky has admitted committing perjury before a Nassau County District Attorney, a federal grand jury in Miami, and in two federal trials in the Southern District.

12. As a consequence of the fact that Lipsky's perjury was disclosed in 72 Cr. 664 and 72 Cr. 1319, cases in which the defendant was on trial, Lipsky wrote a letter to Robert Morvillo, then Chief of the Criminal Division of the United States Attorney's Office. In that letter, a copy of which is attached, Lipsky discloses that he is in "a terrible mental state." He also manifests paranoi about his lawyer, total dependence upon the Government, and deep concern that he has destroyed all chances of help from the Government because of his "foul-up."

13. In addition, Lipsky has been convicted of manslaughter and sentenced to an indeterminate term of up to twenty years.

14. Lipsly has also testified, during the past year and one half, in at least four federal criminal prosecutions. His credibility has been severely attacked therein and the experiences must therefore have had an enormous emotionally traumatic impact.

15. The foregoing facts are strong evidence that Lipsky may be a pathological liar, and raise substantial doubts about his mental competency to be a witness. The defense has a right to exclude the testimony of an incompetent witness and the further right to offer expert testimony on the mental condition and lack of credibility of a witness against him. These

rights cannot be effectively exercised if the defense is denied access to the witness and an opportunity to have a qualified psychiatrist examine and interview him prior to trial.

16. Wherefore, defendant respectfully requests that the court order the Government to produce Lipsky for an interview by a psychiatrist selected by the defense, such production to be on reasonable notice, and in private. Defendant is willing to submit the qualifications of his psychiatrist for approval by the court.

Respectfully submitted,

Steven B. Duke

Steven B. Duke
127 Wall Street
New Haven, Conn.
06520

Attorney for defendant Pacelli

November 21, 1973

COUNTY COURT OF THE COUNTY OF NASSAU
STATE OF NEW YORK: MINEOLA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

AFFIDAVIT

BARRY G. LIPSKY,

Defendant.

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

WALTER GWINN, being duly sworn, deposes and says:

That I am the attorney for the defendant, Barry G. Lipsky, in the above mentioned matter.

That I am making this affidavit in support of an application for a psychiatric examination of the defendant under Section 730.30 of the Criminal Procedure Law. The facts upon which I believe that the defendant may be incapacitated are as follows:

That the defendant has been incarcerated under maximum security, in a single cell, for approximately nine months; that the undersigned recently had an opportunity and did consult with the defendant on many subjects at that time; that on the night of December 4, 1972 the undersigned did spend approximately two hours in consultation with the defendant in preparing to have him testify on his own behalf on a motion to supress on December 5, 1972; that on December 4, 1972 I had given to the defendant a copy of two briefs and asked him to just familiarize himself with certain terms so that he would be able to answer certain questions relative to his willingness to do certain acts, his understanding of the terms "willingness", "free and voluntary", and other related terms.

The defendant informed the undersigned that he had in fact studied the briefs that had been furnished to him but upon interrogation of the witness it was the undersigned's belief that the defendant did not understand or comprehend the meaning of any of the terms that had been suggested to him, and, finally the undersigned determined that the defendant could not adequately testify on his own behalf because of his apparent inability to comprehend the effects of his actions on the day of his arrest and subsequent thereto.

That the undersigned has been informed by the mother of the defendant that they have attempted, in the past, to have him examined by psychologistsor psychiatrists but that the defendant has refused to do so.

That the undersigned has been informed that at a time prior to the defendant's arrest that the defendant became so incensed at a television announcer that he took a gun and fired into a television set in his efforts to silence the announcer from criticizing a football player that was admired by the defendant.

That before the defendant's arrest, the defendant threw two scales into the Atlantic Ocean because both of them refused to reveal that the defendant had lost weight.

That the defendant has displayed, in the past, an ability to remember things such as telephone numbers, license plate numbers, addresses, etc., but, he appears to be extremely slow in comprehending every day details and events concerning his everyday life.

The undersigned would further show that the defendant has repeatedly asked questions of the undersigned in spite of the fact that the exact questions have been answered repeatedly by the undersigned.

That the undersigned would show unto the Court that, at the present time, the defendant appears to be overly afraid that he will be killed prior to

or during his trial; this fear, has, in the opinion of the undersigned, remarkably increased in the last few days.

WHEREFORE, I respectfully request that the relief requested in the Notice of Motion be granted in all respects.

Walter G. Gwinn

WALTER GWINN

Sworn to before me this
6th day of December, 1972.

Barbara D. Hallett

Notary Public

BARBARA D. HALLETT
NOTARY PUBLIC, State of New York
No. 60-[illegible]
Qualified in Nassau County
Commission Expires March 30, 1973

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Barry Lipsky
#59372
C & D South Guard Room
Nassau County Jail
P.O. Box #172, East Meadow
Long Island, N.Y., 11554

December 22, 1972

Mr. Robert G. Morvillo
Chief, Criminal Division
U.S. Attorneys Office for
Southern District of New York
U.S. Court House, Foley Square,
New York, New York

Dear Mr. Morvillo:

Since I met you in your office on Tuesday, December 19, 1972, along with Mr. Phillips, Mr. Gross, and Mr. Higgins, I have been in a terrible mental state. On that day, I told you the complete, absolute truth as it is known to me, concerning these tape recordings that Mr. Walter E. Gwinn, my attorney made of certain phone conversations.

As you know, I am under indictment for murder out here. Since the day last March when I met the first of many people from your office I have never told any of them anything but the truth about all items we ever discussed.

My purpose in writing this letter to you is to let you know that I am deeply concerned about the mistrial in the recent Pacelli narcotics trial. My main purpose for the last 9 1/2 months, has been to try my very best to assist the Government in certain narcotics investigations against individuals whom I previously dealt with while working for Pacelli. I also looked forward eagerly to testifying in narcotics cases for the Government, against Vincent Pacelli Jr. and others.

As I told you in your office, I did not answer Mr. Arkin's questions about alleged "promises" made to me by your office, wrong intentionally, but because I became confused by Mr. Arkin, and related my answers to the Nassau County Murder, and as we have discussed; I unintentionally tried to assist Mr. Gross, the prosecutor in doing his job; something Mr. Gross previously cautioned me not to do.

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In a trial in your District on June 14, 1972, I testified against Pacelli and he was convicted. I told only the truth then, and I told only the truth in this recent trial. Although this time, because the case was shifted at a late date from Mr. Feffer to Mr. Gross, I was not spoken to enough beforehand about any "understandings" that I had with your office concerning any aid I might be given for my role in these cases.

My understanding is, of course, that if I testified for the Government, I wouldn't be prosecuted in the same cases. If, I had said those simple, truthful statements, in this trial, we very likely would not have had a mistrial declared. But, stupidly, I let Mr. Arkin confuse me, and I played right into his hands.

I could go on and on telling you things you already know, but what I want to tell you here is my deep concern for my unintentional "foul-up" in this case and my desire to only tell the complete truth as I have always done with your office. I don't know exactly how this Mr. Castellano fits into this picture, but Mr. Gwinn told me yesterday, December 21, that Castellano was, and is taking Pacelli's money. At this point, I'm not sure who is telling the truth, and who is lying.

Mr. Morvillo, if Mr. Gwinn did something that your office is not at all pleased with, I want to assure you that he did these things (tapings) completely of his own volition and of the 7 tape recordings, I was only aware of 1 of them; the one with myself, Mr. Feffer and Mr. Gwinn on the phone, I still am very unsure of how these tapes got from Mr. Gwinn to Castellano to Arkin. All I have been told is what Mr. Gwinn told me yesterday; that he sent the tapes to Castellano to be used as part of my case, as Castellano was supposed to represent me originally, not Pacelli. Then, Castellano Castellano "supposedly" "sold" or "gave" the tapes to Arkin for use to impeach my testimony, as he did. It's all very confusing to me as to who is lying (if anyone is lying) and just who is telling the truth.

Because Mr. Gwinn represents me in the murder, you can understand my confusion and apprehension about this matter.

I will close this letter here, but I want to let you know that I do appreciate all that you and Mr. Phillips have tried to do to help me out with the Nassau D.A.'s office, even though Mr. Cahn has been very uncooperative.

I'd appreciate it if you wouldn't mention this letter to my counsel.

I'm still very confused about things, but I wanted you to know that I've always told the entire truth to your office.

I've tried to be a good witness for the United States Government to make up in some way for the bad things I've done in the past. I'm a stupid person, which is shown by the amount of serious trouble I've gotten into, but, I don't think that I'm a really bad person, nor a murderer.

Very truly yours,

Barry Lipsky

1st Conversation - Taped and Recorded, as are all following conversations, by Walter E. Gwinn, attorney for Barry Lipsky. Gwinn's address is Suite 1639, Alfred I. Du Pont Building, Miami, Florida, Telephone number 305 - 371-8585; This conversation with U.S. Assistant Federal Attorney Updike of the Southern District in New York City on March 13th 1972 at 10:30 a.m. (6 pages-1 thru5)

2nd Conversation - between Gwinn and U.S. Assistant Federal Attorney Gary Feffer Southern District, Telephone number 212 - 264-6438 on April 6th 1972, at 1:30 p.m. (8 pages - 7 thru 14)

3rd Conversation - between Gwinn and Feffer on April 10th 1972 at 10:33 a.m. (pages 14A thru 14C)

4th Conversation - between Gwinn and Feffer, on April 10th, 1972 at 3:00 p.m. (5 pages - 15thru 20)

5th Conversation - between Gwinn and Feffer with Gwinn's client Barry Lipsky listening to Feffer's end of the conversation while present at Feffer's office in New York City and in between two conversations between Gwinn and Lipsky on April 11, 1972. (12 Pages - 20 thru 31)

6th Conversation - between Gwinn and Feffer on May 2nd 1972, at 1:35 p.m. (5 pages - 32 thru 36)

7th Conversation - between Gwinn and Feffer on May 32rd 1972. (6 pages - 37 thru 42)

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[illegible] you .. uh uh

Gwinn - Well, now Mr. Dillon ...

Feffer - [illegible] - .. and I assume that they're responsible for all the security arrangements under that kind of a set-up.

Gwinn - The problem that .. Now I just spoke to Frank Dillon a few minutes ago and he indicated to me that he would prefer ... of course, they had no objection and neither could he have, but he would prefer that you delay, at least temporarily, interrogating him.

Feffer - [illegible] - Well, that's something we ...

Gwinn - Now, I want ...

Feffer - [illegible] - Do as of now, that's something we cannot do as of now.

Gwinn - You're not inclined to agree with that.

Feffer - [illegible] - It's not a question of inclination. If we delay past Wednesday, uh - then - uh for our immediate problem he is not going to do us any good.

Gwinn - Well, that was leading to my next question. I told Mr. Dillon that I would before advising the man I would have to see whether your matter was a matter of urgency or whether it was routine in order to have you talk to him - don't you see.

Feffer - [illegible] - Well

Gwinn - You already answered it apparently.

Feffer - [illegible] - Yea

Gwinn - Uh, you consider it more than routine.

Feffer - [illegible] - See, he may have more information that that would be - you know - something down the road or something like that. As of now we have about half a dozen or ten very specific questions for him. And, we're about as certain as we can be that he can give us the answers.

Gwinn - Well, of course, I'm looking for any help for him that I can get, let's face it. uh...

Feffer - [illegible] - I can understand that..

Gwinn - Yea (laugh) he is uh ... I had first intended to have him examined by a whole battery of psychologists and manager training people...

Feffer - [illegible] - Yes

Gwinn - ... but I ...

Feffer - [illegible] - I don't think he was nuts.

Gwinn - I backed off ... well just a question ... I know he's not ... I know that there's something wrong with him. I

do not know that he is beastly insane, but I am caught on the horns of a dilemma there. If he is to be of any value Mr. Dillon has to make his decision, you know, as to whether to use him as a witness.

Feffer - [illegible] - Yea, he can't use a screwball.

Gwinn - He can't use a screwball. On the other hand, if Mr. Dillon doesn't want to use him I may have to have a screwball defended ... don't you see. So, I propose in the morning ... I'm going to try to get Gil to take that arraignment for me. I hate to come up there just for that. But, I am going to propose to ... in the morning ... to ask for a ... 30 days more, which I understand under the CPL that would give me 60 days in which to enter the defense of insanity if should it come to light.

Feffer - [illegible] Yea

Gwinn - They have said they will not object to that. Now I have repeatedly requested the copy of the statements that he gave to the State.

Feffer - [illegible] Yea

Gwinn - And so far they haven't given them to me.

Feffer - [illegible] - Yea

Gwinn - which I would like to see that and compare that with what he told me.

Feffer - [illegible] - Yea

Gwinn - But ...

Feffer - [illegible] - Did .. Did .. Did .. Uh Uh Uh .. Did, Did .. Did Uh Uh..

Gwinn - Of course, I don't want to get ... I need your help .. uh some day I hope and I'll also need Dillon's, but I don't want to get you guys fighting.... you see.

Feffer - [illegible] - Yea

Gwinn - ... and get me in the middle...

Feffer - [illegible] No, that's right.

Gwinn - Uh .. I'm trying to be as .. us as diplomatic as I possibly can.

Feffer - [illegible] - Sure ... Well, I don't ... uh uh ... you know uh .. so far we are not headed for a fight with Dillon .. uh uh ... I don't think. I mean, uh ...

Gwinn - I think .. uh ..

Feffer - I have been back and forth and they've got a witness of mine and I got a lot of security problems with him and ... uh ... we work things out ...

Gwinn - Of course, I think the security thing ...

Feffer - Yea

Gwinn - As I said I don't want anybody .. uh .. you know.. uh .. maybe one of your close confidantes perhaps, but I even told Dillon I don't want 13,000 deputies knowing that.. because I don't trust anybody.

Feffer - Yea .. let me .. uh .. wh what makes you think that that cat is not way out of the bag already ... (laugh) uh ..

Gwinn - Well, the .. uh ..

Feffer - Don't you think that these people are already pretty sure that .. uh .. that ... uh ... that he's talking.

Gwinn - Well I don't know. There's been only one contact made .. uh.. from some attorney and Mr. Rosenthal didn't return to call.

Feffer - You know who the lawyer was? I could probably give you a good guess.

Gwinn - I have no ... he didn't tell me the name.

Feffer - Yea

Gwinn - But, Gil was with me all day and we came in his office and left together and he didn't bother to return the call and I told him not to.

Feffer - That's good.

Gwinn - Uh ... I'm not interested in that ... uh. Then, of course, what you say may be quite true .. the .. I am sure that they suspect.

Feffer - I can imagine ..

Gwinn - ... But, on the other hand uh .. I cannot see that they were ... that this man was smart enough to take a dummy like uh .. my guy along on such an expedition. That's what ... uh ..

Feffer - Well ...

Gwinn - You know, that's wierd

Feffer - All these guys are dummies in some way.

Gwinn - They're wierd, man ... but ...

Feffer - It's ...

Gwinn - It's a most ...

Feffer - ... thing, they live in a world ... you know ...

Feffer - [illegible] - if they are ... let's ...

Gwinn - ... that I'm .. uh .. you know, I'm trying to .. uh.. find the reason here...

Feffer - [illegible] - Yea

Gwinn - and I inquired of my man .. uh .. you know, I said well .. uh ... surely you must have made a lot of money .. and then he didn't have a dime.

Feffer - [illegible] - He spends it as fast as he makes it.

Gwinn - Uh .. they they hand .. dole it out to him like you would a child, you see.

Feffer - [illegible] - Yea

Gwinn - And, uh .. He's he's got a screw loose - there's no question about it. Now, whether or not he's insane that's something else. I don't know and don't .. uh ...at this time .. but .. uh .. Gil's in court and so is his partner and I have left word for him to call me ...

Feffer - [illegible] - Uh huh

Gwinn - ... as soon as he gets in and then I'll make a determination as to whether I must come up or not. Now, of course, I can't impose upon my friends...

Feffer - [illegible] - Well, but ...

Gwinn - This afternoon we will make this determination and .. uh .. I - I think that maybe it might be wise if you gave Frank a call ...

Feffer - [illegible] - Yea

Gwinn - ... and ask him that if I .. uh .. make the decision, tell him the urgency of it, or not not the details, but that in your judgment its urgent ...

Feffer - [illegible] - He knows it, I've spoken with him.

Gwinn - ... and .. uh .. ask him .. uh .. you see, I don't want to get him peeved at me and if he agrees .. uh .. and then I can instruct .. uh .. by client .. and through a written situation and make some arrangements to either take him to a uh uh .. to the courthouse where he will be..

Feffer - [illegible] - Yea

Gwinn - ... or to a motel or wherever that ...

Feffer - [illegible] - Dillon, Dillon said he would do all that .... uh .. it's just that the last thing I got out of Dillon and Cahn and everybody over there was that... uh ,, they wanted the the .. uh .. clearance of Lipsky's attorney before .. uh .. he talked with anybody because they didn't want to take uh uh a guy, turn him over to us and the next thing you know he would be squabbling with the lawyer that the guy made a statement after he satisfied the counsel and all the rest of the stuff.

Gwinn - Well ...

Feffer - Unclear - They have a Miranda problem.

Gwinn - Well, that's true.

Feffer - Unclear - They wanted clearance from his lawyer before theylet us talk with him and that's fine with me. Except that we have this very specific time deadline in this situation... and...

Gwinn - ... Well, I .. Uh .. I .. Uh have another problem of course ... I have not gone in the detail as to the .. uh.. uh .. he allegedly gave two statements.

Feffer - Unclear - Uh huh

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Gwinn - Now, the first statement is somewhat suspect under the circumstances if if what he says is true. Now for example, if it were possible to uh .. if it were possible...

Feffer - Unclear - What we're trying to do is tack on a few names and uh ..

Gwinn - But, as long as he is not to be indicted I'll tell him to go all out.

Feffer - Unclear - Yea, Yea. No, No .. we won't indict.

Gwinn - Good enough. All right you'll hear from ...

END

April 6, 1972 - 1:30 p.m. - Attorney Walter Gwinn with U.S. Attorney Assistant Feffer, recorded on the telephone by Walter E. Gwinn

120 - 240

Gwinn - been back up since I saw you.

Feffer - Right, Right

Gwinn - Miami...

Feffer - Walt, how are you.

Gwinn - Well, I'm uh ... I wish it were Friday.

Feffer - So do I

Gwinn - I should call about yesterday.

Feffer - Right

Gwinn - I haven't been back up since I saw you .. uh ..

Feffer - Right

Gwinn - ... and, uh .. nothing has happened ..

Feffer - Right

Gwinn - .. except I read into - I read about about the homicide squad and the district attorney which I read in the paper well and I had to chuckle on that ...

Feffer - Right

Gwinn - the homicide squad ...

Feffer - that directly affects you as well.

Gwinn - Well it .. yes it affects me because it it .. uh .. it it has a bearing, a direct bearing on it, I think.

Feffer - Right

Gwinn - Because I don't think either .. I think the the situs of the thing ... I also had a couple of calls from another attorney who said he represented this other fellow.

Feffer - Yes, Yes ... you

Gwinn - I haven't uh ...

Feffer - That's not my point.

Gwinn - I haven't ... uh ... talked back to him ...

Feffer - Yes (laugh) but that could be dangerous now.

Gwinn - I .. uh .. I .. uh ... just decided to ignore that thing.

Feffer - Right

Gwinn - But, uh ...

Feffer - Right

Gwinn - I left .. I wasn't .. uh .. I was checking, I was checking my notes and I didn't know whether I was supposed to call you back this morning or not.

Feffer - Yea .. yea.. yea .. You said last night .. uh .. that uh .. were going to try to make it up here Friday morning.

Gwinn - Well, I uh .. it looks like that's going to be impossible.

Feffer - Oh boy

Gwinn - ... uh .. about the biggest client I ever had apparently was arrested just shortly after I talked .. about the time I was talking to you.

Feffer - Uh huh

Gwinn - ... and, and adjoining county up here and uh .. and uh .. I'm now involved in trying to get his car and he was under $100,000. bond and all that sort of thing.

Feffer - Well..

Gwinn - But, uh ...

Feffer - See here ... here ... here...

Gwinn - What's uh ... what can I do if I get up there?

Feffer - Well, please, as I told you last night, we want to talk to him ... uh ... solely about .. uh .....the narcotics case that's coming up ... the one that I talked to him about before ... I just want to go over that again, and to talk to him about the possibility of knowledge with respect to other narcotics cases ... nothing at all opposite with respect to the alleged crime up in Nassau County.

Gwinn - Is there anything new that that you didn't cover before?

Feffer - Well, with respect to that case - no. It would be to go over it and just to make positive. You know. Because at that time we were pressured by Dillon saying that we could only stay there for a few minutes.

Gwinn - Yea

Feffer - However, we would like to see .. uh .. whether he could be of help in other cases, because of his, you know, relationship with Pacelli who as you know is uh ... was uh.. you know convicted here and is going to be sentenced next week.

Gwinn - When is he supposed to be sentenced.

Feffer - Next week

Gwinn - Next week

Feffer - Yea ... so, the problem we have though is a time problem. you see Dillon put us off for a couple of weeks .. uh uh .. telling us that, you know that it wouldn't be advisable for us to speak to them or to Lipsky until his investigation was complete. Well we did that and now uh .. uh .. the judge here is not going to give us any more time. I mean Peter ...

Gwinn - Well now .. uh .. do you ... uh ... take it that you are speaking about a particular prosecution that you had in mind ...

Feffer - (Stutters) I have a case ...

Gwinn - ... that Lipsky ...

Feffer - No ... uh ... in which .. uh .. Barry Lipsky is the is the John Doe.. that that was the one that we discussed last uh .. uh .. last time time uh we were out there and we would very much like to uh .. uh .. use them in that particular trial. Uh .. we we would .. uh .. also like to see .. uh ..

Gwinn - ... Now when is that scheduled for trial?

Feffer - That's scheduled for trial .. uh .. a week from now. And, and uh .. it .. it. If we can't use him then we've probably got to forget about going to trial... because uh ... uh ...

Gwinn - Is this against Pacelli?

Feffer - No, No .. uh .. this this is against the fellow who I had asked him about last time. This this is the fellow by the name of Lombardero and Valentine, whatever his name is.
Because ...

Gwinn - Did you say it's a week from Monday - your trial?

Feffer - Yea

Gwinn - Is that ...

Feffer - But ... but, the problem we have is that that is that we may have to supercede our indictment. So we have to let the judge know. We told him by this week. So that so that is why tomorrow was so important and .. uh .. I can ... uh ... assure you that that uh .. we have no interest or desire to talk to him about anything other than the ...

Gwinn - Well, I I .. uh .. I have nothing but trust and admiration for you ... I wouldn't be talking to you .. I don't doubt that a bit ..

Feffer - Right.

Gwinn - Uh ... my biggest ... uh ... I talked to Dillon yesterday...

Feffer - Yea

Gwinn - ... and uh .. uh .. I frankly I've gone over this thing pretty good and I have been going over this New York Code..

Feffer - Yea

Gwinn - I'm not at all convinced that this case of his can't be defended ...

Feffer - Yea

Gwinn - ... but ... uh .. I'm not sure that it can. But .. uh .. uh .. I've tried a hell of a lot worse ones and lost them, too, but the point is I've been trying to get some idea from these people ...

Feffer - Right

Gwinn - ... about a conference .. uh .. when I could expect to have these people finished .. uh ..

Feffer - I could appreciate that.

Gwinn - .. and then .. uh .. I wanted to sit down because he is in , undoubtedly violation of his parole by even hanging around with these people.

Feffer - Sure

Gwinn - And .. uh .. I am sure that Joe Eaton down here is going to send him to jail.. uh .. so if I could make some sort of arrangement to uh to uh plead him in up there .. uh .. I want to do it ... uh .. He's in a very precarious position because obviously .. uh .. and easily frightened because be realized that you're not playing tiddeley winks with a bunch of .. uh .. uh .. because from from looking at the corpse of that girl ...

Feffer - Yea

Gwinn - ... and this boy withhis own eyes saw what can happen to a witness.

Feffer - Right

Gwinn - uh .. uh .. I tell you .. I .. Uh ...

Feffer - You see .. one of the thing we could we could always do ... which we don't want to do because it makes the where we're involved.
We could writ him over here... and uh you know.. and uh and then take Dillon out of the picture completely.. uh .. and then do it between you and us .. but .. uh .. that presents a lot ofproblems .. uh .. We don't want to transport him unnecessarily and uh .. and uh .. uh .. we want to cooperate with him as much as possible I guess you know uh .. on you know .. but .. uh ..

Gwinn - That, of course, is out ...

Feffer - ... our nerves are beginning to uh .. you know run to an end here. They they ...

Gwinn - Well I was rather .. uh shocked by the lack of .. uh cooperation between your .. uh .. office and ... uh ..

Feffer - Well

Gwinn - In fact uh uh I .. Uh .. that's unheard of here.

Feffer - Well to put it frankly, we're .. we're shocked too. I mean we .. we've ...

Gwinn - This just isn't .. uh .. I've been all over the country trying cases. I've never seen it and I just finally .. uh you know .. uh .. had to just insist that we get on with it.

Feffer - Right

Gwinn - Uh .. If I could do this I might be able to get an attorney up there ...

Feffer - O.K.

Gwinn - Uh ...

Feffer - Uh .. uh .. uh .. There is no possibility though that they would be going tomorrow morning to talk to him without you being there. We're going to be making up obviously The agent who will be with me will be making up a full report .. uh .. based on what he says and I uh obviously you .. uh .. the access of that report for you is uh is yours for the asking.

Gwinn - Well, of course, if we had some way, as I said before, the only way to guard him is to record it.

Feffer - Yea, that's that's the problem you can understand from our position.

Gwinn - And .. uh .. and of course.. uh .. your word that you're not going to prosecute him is all I've ever needed anyway.

Feffer - Right. Oh no no that's that should be understood from the from from the beginning.

Gwinn - Yea

Feffer - Don't worry about that.

Gwinn - Well, if uh .. I don't know if I could get word to him .. uh .. I'd .. Le Let me say this to you. If you could get him on the telephone ...

Feffer - If I could get who on the telephone? Dillon?

Gwinn - Barry.

[illegible] I think you're asking for the impossible here.

Gwinn - Huh??

Feffer - I think you're asking for the impossible when you...

Gwinn - Oh (laughs) surely they'll let you do that.

Feffer - I don't .. uh.. with knowing .. uh .. knowing Dillon I would get a run around that would last ... uh .. frankly, they don't want to ... I ... uh uh

Gwinn - ..I wouldn't even talk to Dillon. If I was you I would just go uh out of if if we could work it out, I'd go directly to the damn jail and check in and talk to him. You're...

Feffer - Unfortunately, we can't do that because .. uh .. I'm sure that .. uh ... that .. uh .. Dillon has completely - complete control over access to him.

Gwinn - Well I'll tell you .. uh .. I see no reason why that .. uh .. that we couldn't have a telephone hook up. If you could boil the thing down and we could .. uh ... set here and .. uh .. I could participate over the phone. You see it just costs so damn much money and this boy's mother - Every time I come up there it's another $300 or $400, you know, and .. uh .. and ...

Feffer - Wait. There's no local counsel that you could have to sit in for the day .. over there?

Gwinn - Well there's possibly is. I haven't talked to any. There's a couple in Mineola over there .. uh .. uh .. Castellani I think his name was or somebody..mentioned. I looked in Martingdale - Hubbell ... um ... What's your phone number, incidentally, the one you gave me is .. uh .. we got is not correct.

Feffer - I gave you 264-6438.

Gwinn - Yea and that's not right.

Feffer - It's the number I'm talking from right now. ha ha.

Gwinn - Well I got .. we get a recording says that number is not in ... um ..

Feffer - ...no, no. You should have gotten 264-6438 - Area code 212.

Gwinn - 264. What is it?

Feffer - 264

Gwinn - Yea

Feffer - 6438. sixty-four thirty-eight. Area code 212.

Gwinn - Well listen.. uh .. let me see if I can .. uh ..uh.. talk to somebody up there

Feffer - O.K. You see.. here's here's where the problem I face. If I if I go back now to .. uh .. Seymour up here and you know being with security laugh, tell him again that we have problems. I'm afraid he's going to writ him over here, which is gonna present all kind of problems to everybody involved. Uh .. I .. I was really hoping that today I .. uh .. the agent went out there and he and he and you know he was ready to go and a and a we were held back.. but we have absolutely got to speak to him tomorrow. We we were trying to do it as you well know over a month ago and the judge is not going to permit us to drag this thing on .. uh ...

Gwinn - I see

Feffer - .. the defendant here is in jail and he's gonna cut him loose.

Gwinn - Well, that is .. uh .. I might be able to arrange to come up there. I'll uh ... Are you going to be in the rest of the day?

Feffer - Yea, Yea and Yea... as a matter of fact if I don't hear from you for some reason, I'll give you a call back myself late in the afternoon.

Gwinn - Well.. uh ... I don't want to go through the hassle I did before. I I've got no.. uh .. time for that sort of thing and I'm getting too damn old now to appreciate it so ..

Feffer - (laughter)

Gwinn - ... if you will call uh uh Dillon...

Feffer - Yea

Gwinn - ... and tell Dillon what your desires are...

Feffer - Oh yea I already did that. I did that.

Gwinn - And, what did he say?

Feffer - Dillon said that we could speak to Lipsky, providing you say it's okay - and he won't take my word for it. He insists upon you telephoning him - or I guess leaving word with his secretary, That it's O.K.

Gwinn -Well...

Feffer - He won't take my word for it. I asked him that. I couldn't believe that - but he said "no" I got to talk to .. uh...

Gwinn- ... Well, let me .. uh .. let me see if I can make some some some type of thing .. uh ..uh.. Maybe I can get up there in the morning.

Feffer - O.K., O.K.

Gwinn - I'll call you a little later.

Feffer - O.K. because right now we're planning to go up there about 9:30 in that area tomorrow morning.

Gwinn - Well I'll see if I can get .. uh .. if I do, could you pick me up at the airport and bring me back?

Feffer - That that that might be a problem because I ...

Gwinn - I have no transportation.

Feffer - Yea, yea - with the with the Government .... I think maybe maybe the .. uh ..

Gwinn - Oh hell. That's done all the time. I ride all over the place with District Attorneys.

Feffer - Yea, let me let me.....

END

April 10, 1972, Conversation between Gwinn and Feffer at 10:33 a.m.

Feffer - Hello, Mr. Gwinn

Gwinn - Yes

Feffer - How are you?

Gwinn - Gary?

Feffer - Yeah

Gwinn - O.K. Pal, I just got a call from uh - it seems the warden up there called up over, Warden Flood's concerned about my client.

Feffer - Right, Yeah, I called him this morning what happened was when I got back on Friday we sat down and discussed it and we decided, as I told you, that we'd supersede the indictment.

Gwinn - Yeah

Feffer - and that we wanted to bring Barry over tomorrow for the purposes of the Grand Jury.

Gwinn - I just heard the news - they found a couple of more hoods shot up there today.

Feffer - Yeah Yeah

Gwinn - Well, I don't know Gary, I just hope that, needless to say, I hope that, maximum efforts are made -

Feffer - No No question about it, I'm I'm I say most of the day today you know, making as a matter of fact, we're going to use 3 or 4 people to take care of this.

Gwinn - Well now, do you plan to indict him too or just Nolle?...

Feffer - Yeah Yeah this is what I'm going to discuss later on today, obviously if we did, it'd be only - you know - for the purpose of the case and if that was so as opposed to the people he's involved with, for the purpose of having him as a surprize witness.

Gwinn - Well of course, that brings on problems but uh ...

Feffer - I can go into that now and get back to you - I think though - the intention was, was to indict.

Gwinn - How many people do you have under the indictment?

Feffer - Under the indictment now there are 5 people.

Gwinn - Well, do you plan to stay with that or abandon some of them? - You don't plan to abandon any of those people you got under indictment?

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Feffer - Just one who is already convicted.

Gwinn - Oh I see

Feffer - so there'd be 4 and as I say I would discuss this further.

Gwinn - Well, I tell you the only thing that would shake this guy up is if he knows he's going to be indicted.

Feffer - Yeah

Gwinn - Now, I'm going to have to talk to him some way - the only way that I know - and it's absolutely impossible for me to come up there I just can't do it - could you get him to a phone someplace and call me and let me explain to him what's going to happen?

Feffer - Well, I'll tell you what I can do, I could do this - I think it would be almost impossible for me to get through to the warden to make any sense out of it, but I could have him call you when he's here tomorrow morning.

Gwinn - Well, that's good enough

Feffer - You see I and you could talk to him in full from my office.

Gwinn - Well, it's better now listen I have an arraignment in the morning and I should be back here about 10:30.

Feffer - O.K. I'm not sure exactly when we'll get him over HERE ANYWAY but it should probably be in that area

Gwinn - Well, I'm going to put down here 10:30 and, because when if he sees the paper - I don't know man it's rough.

Feffer - Yeah

Gwinn - But in any event I'll wait - I'll stay here in the office until you call me.

Feffer - O.K. tomorrow morning, then - well - one other thing too - you said you're going to possibly retain New York Counsel

Gwinn - Well, it looks like I'm going to have to I don't have any yet.

Feffer - the reason why that this was as follows - I would rather not go through one of those sessions like we did before - you know, with the Narcotic people here, bringing in Dillon and making you come up and all that Now I was wondering since he was going to be here tomorrow, if in conjuction with that, if we could have him spoken to by the same people spoke to him on Friday continuing up and following up on their [illegible] activity.

Gwinn - Well, I don't think there's any ...

Feffer - cause that way we avoid Dillon around taking his notes and possibly wanting to use them and you know this kind of thing

Gwinn - I dont think there'd be any objection certainly to that - I just don't have anybody on such short notice to sit in and that's about all they'd do - but I'll see what I can do. Now

in the meantime, I was supposed to hear from Dillon today and I haven't heard a word. I'm just so frustrated- that's the only word I know to use - about the damn thing, cause my time's running out for...

Feffer- I know it- I understand that...

Gwinn- for filing the motionsand uh well, the hell with it. I'm not going to call today, I'm going to wait until tomorrow so when you get him in there at 10:30 give me a call.

Feffer- OK, will do.

Gwinn- Again I'm concerned

Feffer- OK.

GWinn- OK

Feffer- Hey, Walt. One second now, with respect to questioning him tomorrow- What's your position on that?

Gwinn- I'll have to decide it in the morning, Let me think on that a minute- It'll be done but I'm just trying to represent the man and...

Feffer- Oh sure, I understand, I didn't want to do anything until I talked to you.

Gwinn- Well, that's a good idea, don't do anything until I OK it, at least.

Feffer- OK, I'll give you a call in the morning and I may get back to you later on today if I have any information.

Gwinn- I'll be here most of the day.

Feffer- OK.

Gwinn- Allright.

Feffer- Bye-bye.

End of Conversation

by Walter E. Gwinn.

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Feffer - Hi - how are you, Walt?

Gwinn - O.K. good - what's up?

Feffer - I I talked with .. uh .. with our people here .. uh .. with with respect to how we're going to handle this tomorrow.

Gwinn - Yea

Feffer - Uh ... they're they're feeling is this.. is that.. uh .. unless unless we indict him ... uh .. it would it would be really silly for our purpose and for his purposes to go ahead. I wouldn't provide him any protection at all.

Gwinn - Yea

Feffer - Uh .. I mean.. uh .. uh ...

Gwinn - I don't think it makes much difference really.

Feffer - Well - you see you see it does because because ... uh .. uh ... if he's indicted and he and he pleads guilty to it.. you see.to the indictment.. then then ... uh ... uh ... from our point of view first .. uh .. it makes a more stronger case. If he's just given immunity ahead of time and it's a one on one situation anyway.. uh ..

Gwinn - Well, I don't want him to plead guilty, Gary.

Feffer - Well I mean - that's that's ...

Gwinn - That's no good because .. uh .. uh .. no - well, it's going to wind up being one on one anyway.

Feffer - Yea, yea - Oh yea .. there's no question about that. But, if we give the guy immunity, it doesn't make any sense from from our point of view - I mean...

Gwinn - Well, hell - I've got Teresi that's been all over the country

Feffer - ... from our point of view, I mean...

Gwinn - ...complete immunity, paid his family and every other thing and they haven't lost a case with him - so, it just depends on how good he is. See now this aspect of it I haven't discussed with him at all.

Feffer - Right

Gwinn - I .. uh .. I'm just getting really concerned about the safety of not only him but his family down here's really been on me this morning - His mother's just left as a matter of fact and they're not-they realize that it's kind of rough I think..uh.. I think probably it would ..uh..cause I know it would be ideal, but .. uh ..

Feffer - See- I don't think it gonna..uh..The outcome to him is

going to be the same anyway... I ... I .... it

Gwinn - Well

Feffer - ... it makes it a lot more difficult for us.. uh .. to give immunity to a guy and then put him on in a one on one situation and try to convince the jury - especially someone like him - that he's that he's telling the truth ... ah ... if we go about it - but, of course...

Gwinn - Now, like I told you, Gary, you got a situation to about with where if they if they get wise to it.. uh .. they're gonna have a whole transcript where he's lied under oath. Now this may hurt you anyway if you are going to - for example, if you had that under "Brady".

Feffer - Yea

Gwinn - This would be "Brady" material in my judgment. That you'd have to furnish... I think you guys just don't have a very lily white client ..uh.. I mean witness .. as you never do have.

Feffer - Oh yea - I mean we're we're perfectly aware of this fact. (laugh).

Gwinn - You don't ever get them baptist preachers for witnesses.

Feffer - Yea - for that kind of case.

Gwinn - Well .. uh .. but now uh here he is .. uh .. I think that he he he's going to balk all to hell on being indicted. I .. uh .. I see no reason if you want to indict him why ... uh ..uh.. his case can't be severed and nolle prossed. You arrive at the same thing.

Feffer - What do you mean? You mean - you mean to indict him and do what? I'm not following you.

Gwinn - Indict him - if you want to - then move to - uh - you can move to try his case later - sever him - and try the other guy and then nolle pross his case. In the meantime ... uh ...uh... that would give him a great deal more protection rather than me - It's pretty difficult for me to advise him to plead guilty to an offense that he that he told about. Uh - Well, I don't want to get myself into problems either.

Feffer - Yea, I know. Here here's the thing with that. Uh Uh .. It's it's true. He told us so with - uh - you know- about about Pacelli. I mean - I mean - no question about that.

Gwinn - These other guys.

Feffer - Yea - but uh - yea but -uh - what I've been talking about about the - most of what he said on on a Friday where we were talking about the one transaction that we would probably indict him for it.

Gwinn - Yea

Feffer - But - uh - you know the reason why why we even got to

him to begin with was was because the agents did recognize him as the as the John Doe in our in our previous case. So we probably would have indicted him even if he hadna been cooperative. It would have been tougher obviously. But, we probably would've, you know, gone ahead and indicted him anyway. Without even talking to him.

Gwinn - Well of course, of course, this comes in another god damn 10,000 trips and .. uh .. appearancesin court and.. uh ...

Feffer - No, no , no - For one thing, we're talking about grand jury tomorrow - you know - uh - which is worked out already and the next thing will be the trial ... and, if he pleaded guilty - uh, I mean - if he pleaded guilty which he could enter at any time and uh- the trial and that's it.

Gwinn - Well - this brings up an awful lot of questions and problems that I hadn't anticipated. I don't know what kind of judges you got up there. I don't know whether your District Attorney permits - uh - negotiations of pleas.

Feffer - Our Our practice here is this. Is that .....

Gwinn - Plea bargaining and uh ...

Feffer - No, no there's no bargaining. Our practice here is is this. If a fellow in his situation uh .. is indicted and the basis of the indictment is is what it is in our situation - then we - uh make it very very clear - uh - on the record to the judge exactly what the circumstances of this indictment are and we spell out completely the full extent of the cooperation.

Gwinn - But you subject him to maximum punishment.

Feffer - Very true. But, I mean - uh you got to be - in in a technical sense we do. But that's not the way - you know - prectically speaking it wouldn't necessarily work out.

Gwinn - Well I don't know, Gary. This this is the difficulty. A guy facing a murder rap - he ain't too concerned about something else.

Feffer - Oh yea - yea.

Gwinn - Uh - but the point, I think you'd better go back to these people because - uh - we had a negotiated plea on him down here ...

Feffer - Uh huh.

Gwinn - But - uh - I don't I wouldn't - you can't tell me what any of these damn judges are gonna do. And you can set there and tell them whatever the Government thinks...

Feffer - Uh huh.

Gwinn - ... and they tell you the Government is not sentencing the man... I - uh - cause I heard him say, this guy winds up

Gwinn - for twenty or fifteen - twenty year sentence looking at cont'd him and uh - and here I'm setting here with egg on my face . Now the American Bar Association and uh many of the Federal districts all over the country - including this one ...

Feffer - Uh huh

Gwinn - ... have negotiated pleas in advance.

Feffer - Oh yea - yea I understand that.

Gwinn - The only way in the world I'll let him plead is to negotiate the plea. Because. I just got to protect my own self. They're paying me to represent this man.

Feffer - Right.

Gwinn - And - uh - I don't want to look like an idiot and then maybe get a chance of getting shot and uh in the meantime.

Feffer - Right

Gwinn - So, I don't think it's any more than at least fair to - uh - to - uh - talk to - uh ...

Feffer - I certainly will.

Gwinn - Otherwise we got a severe problem.

Feffer - Okay, let me do this. Let me go back and talk to - uh -

Gwinn - Or else - you don't have to indict him. I don't even think it's necessary to indict him. You see-They already know that lawyer knows what he's facing. He already knows he's given statements. See. That lawyer's gonna have all that stuff looking you - looking right down your throat with it - when you go to trial.

Feffer - Yea - well - yea - yea - and of course it - if you have the ...

Gwinn - Now this thing down down here is causing me no end of problems with this grand jury testimony,

Feffer - Yea - yea - except - except ...yea yea

Gwinn - Now I didn't send it to you - the reason is that - uh - it may be some help if you don't have it.-

Feffer - Right .

Gwinn - Then, you can't furnish it. But - it's - it's hedging right on the border. We're walking a fence even on that.

Feffer - Right.

Gwinn - Uh - I think it's an unusual case. Uh - Although I think he'd be very - like a good witness - I know from thisdamn Teresi - I just couldn't believe that juries would convict on him.

Feffer - Right

Gwinn - But, after we showed thousand upon thousands of dollars the Government paid him a year - and a - all these things - and by God they haven't lost one time.

Feffer - Right

Gwinn - They tied one, one hung jury in Boston - in Maryland - is the only one I know about - but ...

Feffer - Yea

Gwinn - I better reevaluate this thing because I'm getting my self over my head here - uh ...

Feffer - Well, let me - let me do this, Walt ...

Gwinn - I think it be much better to let him waive his immunity and let him testify and not indict him - use him as a witness tell him and play it right straight out from the start. And then on your presentation you just don't have people in this business that are not lily whites - you got to take the best of what you got.

Feffer - Oh yea

Gwinn - I'm sure you got other testimony that you can use to corroborate him.

Feffer - Yea - well let me, let me put this to you as well Uh, one of your ideas was to indict and then to sever and move for trial afterwards.

Gwinn - And nolleprosse it - Damn it the United States can nolleprosse anything.

Feffer - O.K. Let me do this Walt, Let me go back and ...

Gwinn - Better get back because this is out of the, I know this would be ideal for you - I'm not a dummy - but at the same time I'll appear to be a dummy if I permit this and I know he won't do it because he'll be scared to death.

Feffer - O.K.

Gwinn - I would rather just have been brought in as a witness.

Feffer - O.K. - Let me let me talk to the fellows up here.

Gwinn - There's no need to indict him because #1 there, our logical argument simply is this - he is already under probation violation - he's going to prison for that - he's facing murder piece in which he has signed two statements admitting his implicit complicity in that..

Feffer - Right

Gwinn - Which he's going to get time - Now how much time do you want to give him - what the hell's the use to indict him.

Feffer - Right

Gwinn - This is like indicting a man for parking tickets in the death row.

Feffer - Oh yea - I know that, but I mean, uh this is precisely the reason why why I feel so strongly that if we indicted him and he pleaded that it would work out the way he wanted it to.

Gwinn - He'll admit his partic - he'll confess his participation on the stand under oath whether he's indicted or not

Feffer - Yeah - That's ... That's ...

Gwinn - I think we ought to work it, just call him as a plain witness.

Feffer - O.K. Let me do this let me go and speak to them and I'll get back to you.

Gwinn - O.K. I'll be here

Feffer - Right (END OF CONVERSATION)

Conversation on April 11, 1972, between Gwinn and Feffer.
(TAKEN ON TWO TAPES)

Feffer - [illegible] and he's amenable to your suggestion - this is what he says now that we would indict Barry - we would sever the case and Barry would never be tried - there would be no pleading he would be - would never be tried.

Gwinn - Now that means you'd have to nolle prosse it or move to dismiss it.

Feffer - Walt, all I'm, I'm saying is he would never be tried, you know, you know...

Gwinn - But you just can't leave it hanging there.

Feffer - It's not going to be hanging, Walt, he's never going to go to trial - never.

Gwinn - How do you - from - how do you - I just want to know how do you going propose to do it.

Feffer - Precisely you know the way you suggested yesterday basically it would be from our point of view...

Gwinn - You'd have to go in to the judge and move to dismiss it after the trial.

Feffer - Yeah, Yup, Walt, see mechanically I'm not sure at this point exactly how it will be done, all I can tell you is that Barry Lipsky will never be tried, O.K.? We have no intention of trying him we are only going to use him as a witness he, he is being indicted for basically the reasons that we talked about yesterday because without an indictment uh uh ...

Gwinn - Well let me ask you now, you got a-suppose, on the severence now suppose that-do you have a judge now that's going to kind of cooperate a little bit with you?

Feffer - Marlow said here there's absolutely no problem with the gov't moving to sever certain sinners

Gwinn - Is that right.

Feffer - Yeah, I can tell you no matter what happens we have no intentions and we will not try Barry Lipsky I'm telling you that in clear.

Gwinn - What you're speaking of is the Snuffy Smith in the newspaper says the whole new Ited States of America.

Feffer - I'm speaking, I'm speaking from the head office here which has complete control in a case like this - we are not going to try Barry Lipsky and I hope you have your recorder on loud and clear. (laughter)

Gwinn - Allright,Let me - Is he around?

Feffer - Yes, he certainly is.

Gwinn - O.K. let me speak to Barry.

Lipsky - Good morning

Gwinn - Hi Barry

Lipsky - Hiya, Mr. Gwinn, how are you?

Gwinn - How you feel?

Lipsky - Oh, I feel good getting in the fresh air.

Gwinn - Well, good, I, your mother called - she looks beautiful- I think your mother isavery beautiful woman really she was going to come over this morning she came over yesterday I told her not to come over - it would just upset her and maybe upset you.

Lipsky - What does she keep coming over for?

Gwinn - Oh she just wants to talk to,me and I reassure...

Lipsky - Yeah, Well that's nice of you, she needs....

Gwinn - Now, we had a small problem there Barry yesterday - you know now originally back in April on April the 13th, on March 13th when I talked to Mr. Updike...

Lipsky - Yup

Gwinn - He gave me his unqualified promise that if you talk to the

agents that they would not indict you.

Lipsky - Yes

Gwinn - Now then, when I talked back again on the April 6th...

Lipsky - Right

Gwinn - With Mr. Feffer, I told him that his word that that they would not indict you, is all I ever needed.

Lipsky - Right

Gwinn - and he says - well, we're not going to, don't worry about it, you have my word

Lipsky - on, on this case

Gwinn - Now then they begin to worry about the fact that if you were not indicted that will weaken their case now I don't choose to take on another defense of your case ...

Lipsky - Yeah

Gwinn - in this damn thing ...

Lipsky - Right

Gwinn - Now I'm not too sure that I don't know what all they have on you they apparently - you were - they knew something about your activities

Lipsky - Yeah, Yeah well you know and ....

Gwinn - But...But you - let me finish. Are they listening on the extension?

Lipsky - Not that I know of ....

Gwinn - Allright - I'm a little disappointed because I may be a hillbilly, but I may be a little stupid but I'm ain't that god damned dumb but I just, I just had the foresight to record both the things that they said as I'm now recording...

Lipsky - Yeah

Gwinn - what you and I say, of course, I told this young man that I didn't care to embarrass him ...

Lipsky - Right

Gwinn - but if they insisted in indicting and trying you or making you plead guilty and then have to take some judge's idea as to what sentence you would get - We were not going to do it - I would instruct you to talk to nobody about a god damned thing...

Lipsky - exactly

Gwinn - All right - now you heard what he said -

Lipsky - I heard exactly what and what he said to you

Gwinn - Now he left, But I did record it and I have it in case I drop dead or he does

Lipsky - Yeah

Gwinn - Now this means of course that they would indict you and then - uh -, go in and I suppose would have to dismiss it.

Lipsky - Yeah, I heard just, just what he said

Gwinn - Now I'm not too sure what he said if they'd dismiss it or what, because here's the thing eventually you'll be up for parole; don't you see?

Lipsky - On what?

Gwinn - On the case down here.

Lipsky - On the one there?

Gwinn - Yeah and uh ...

Lipsky - And we're not even talking at this time about the one out in the county.

Gwinn - Well I'm talking about the one in Florida; if we're lucky, some day you'll come up for parole

Lipsky - Yeah

Gwinn - Now you can't be paroled as long as there's a case pending against you

Lipsky - I see what you mean

Gwinn - Now I'm going to have to straighten this out with the authorities - there as to how their mechanics is to go about it

Lipsky - Do you want to talk to Mr. Feffer again?

Gwinn - Not at the moment.

Lipsky - Uh Uh

Gwinn - I just wanted you to know and ask you, in view of what they say

Lipsky - Yes

Gwinn - If it was your desire to to testify

Lipsky - Well, maybe I'm just gullible but I don't know exactly, Mr. Gwinn - I heard the whole conversation you know

Gwinn - Well, I don't think you're gullible, I'm just a cautious man

Lipsky - Yeah

Gwinn - I have to be

Lipsky - You have to because ...

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Lipsky - I depend on your caution exactly-not being a lawyer...

Gwinn - We need the help of these people, no question about that.

Lipsky - No question about that

Gwinn - They've agreed to go down with me en masse to a judge now I'm not getting any help over at all

Lipsky - I saw that, cause you see, what I wanted to say to you- I know you're not an excitable person - you never try to show it. But from what you said to me last Friday the day you were out there about that other gentleman that was in the meeting with us there, it's got me quite upset because ...

Gwinn - Well he's jerking me around and I'm - I don't need that. I'm getting sick of that

Lipsky - Used to being treated like that way.

Gwinn - And I'm going to try your case and they can go to hell with Pacelli if I don't get some action in the next 2 or 3 days I'm going set your case for trial

Gwinn - Now I'm just stupid enough to think I can beat it

Lipsky - You think there's a shot?

Gwinn - You're damn right there's a shot,

Lipsky - Allright - I'll go along with you cause they've haven't they just even not moving their feet on that

Gwinn - They're doing nothing but giving me a bad time now I called the Warden he's an old East Virginian and we had an old bull shit contest there yesterday, and we're good friends now

Lipsky - The one over from where I am ...

Gwinn - Yeah, Warden Flood, so you see you have a right if you go in fromtof a Grand Jury to refuse to answer any question that would incriminate you

Lipsky - You're talking about Grand Jury on this

Gwinn - Right today

Lipsky - This new matter

Gwinn - Yeah, I'm telling you what your rights are

Lipsky - Right

Gwinn - and if you don't understand them then you then we'll go over them 100 more times because if there's any question about it, I'd come up there but...

Lipsky - Well, no

Gwinn - or if you even thought you wantedme but...

Lipsky - I understand you position we have a few different matters going here they're really dragging themselves out there on the other end but...

Gwinn - I don't think we have them on this end on the end where you are now

Lipsky - Now I think they want to do nothing but help you, and me because of the position I'm in.

Gwinn - Well the point I'm trying to make is now any person called before the Grand Jury has an absolute right to refuse to answer any questions that not only would connect him with the crime.

Lipsky - Right

Gwinn - But would ever tend to, that is would even be the weakest link in a chain of evidence that would connect him to a crime.

Lipsky - Right

Gwinn - or you have a right if you want to, to waive that right and testify.

Lipsky - What do you think?

Gwinn - Knowing that what you'd say would be used against you if they want to do it ...

Lipsky - Yeah but ...

Gwinn - Now then, we have a verbal contract with the government.

Lipsky - Yes

Gwinn - Now we're talking about the government of the United States - if you can't have a deal, trust the United States Government ...

Lipsky - You can't

Gwinn - Then I'm ready to just pack it in.

Lipsky - Yeah I did this before in Florida and lived up to ...

Gwinn - Their agreement

Lipsky - Yeah well that was one --

Gwinn - Now you realize that your name will come out on the indictment - it will be given a severence which they will try those other people first

Lipsky - as the man said

Gwinn - and you would have to be a witness and then they would go in and move to I hope, dismiss the case against you

Lipsky - Well, that's what I just heard the gentleman say to you here and ...

Gwinn - Well I want to make sure that thats what they plan to do now that be the case now then, if they're going to continue to discuss other matters with you - you're not to talk about another damn thing.

Lipsky - Oh that's what I wanted to ask you.

Gwinn - Unless the Justice Lombardi, what's his name?

Lipsky - Justice? - I don't know.

Gwinn - Well you know the name I'm thinking about - the one they're talking about

Lipsky - Lombardero?

Gwinn - Lombardero - That's the only case I want them to interrogate you about

Lipsky - You don't want me to talk to them about anything up here

but listen to me

Gwinn - If - oh yes/- if they do I want the same promise from them

Lipsky - I understand

Gwinn - That they're not going to prosecute you for whatever else you tell them

Lipsky - Individual matters

Gwinn - Any damn thing

Lipsky - I see, I get ya, Mr. Feffer wants to talk to you about that

Gwinn - Now hold on just a minute, I have to change this tape...

Lipsky - All right

Gwinn - Cause I said we'll work it out some way if it is worked out to your satisfaction we'll work it out same way.

Lipsky - Yes

Gwinn - If it is worked out to your satisfaction, Now Barry I don't have to tell you how dangerous this is - they 2 or 3 more bodies found up there.

Lipsky - Wow I'm just reading it in the papers right now

Gwinn - There was somebody down at the lounge looking for me this morning

Lipsky - I wanted to say something to you about this, about this matter about this lawyer who's been trying to reach you.

Gwinn - Yeah

Lipsky - I wouldn't I can't tell you what to do but I wouldn't even give this man a hello that's my - I think we have absolutely nothing to gain there.

Lipsky - Maybe I'm wrong

Gwinn - No I agree with you

Lipsky - I know what he wants.

Gwinn - Well sure

Lipsky - I know who he is ...

Gwinn - All right I'll talk you in a minute - Put Gary on

Lipsky - All right, just a second

Feffer - Walt?

Gwinn - Gary, I've taken the opportunity to explain his rights to him and in detail he seems to know just what it is

Feffer - Right

Gwinn - Now I told him that if he waived those rights and testified in front of the Grand Jury it was my understanding that he would be indicted and secondly that his case would be severed and that you see, he could never be ... the only i want to know about Gary is as long as he's in prison he could never be considered for parole as long as there's a case outstanding

Feffer - Sure - Right

Gwinn - So we would have to move to dismiss the case sometime in the next foreseeable future

Feffer - Right

Gwinn - and you agree to that

Feffer - Yeah, see it's very hard to look into the future and look into the mechanics of it what actually happens

Gwinn - Well that's usually what happens and that's what would have to be in this case after your case is all over for example ...

Feffer - Yeah, we would actually take the lead probably in that situation.

Gwinn - You and I could go in before the Judge or your your boss now then I've also told him perhaps that after his testimony today that the agents may, that justice may be interested in other things

Feffer - Right

Gwinn - And I told him that before he continues his investigation, I would want the promise just as we have in this case, that he would not be prosecuted ...

Feffer - Walt, I can categorically state to you that any information that he gives as to this case or to any other case that he makes he'll be used as a witness only and never be brought to trial for any information that comes out of his mouth this case or any other case.

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Gwinn - Well, all right and that, in other words, we're talking about a contract to complete transactional immunity is what you're saying

Feffer - Yeah Yeah, exactly in other words in any other case I think that developed would be handled the same way, he'd be indicted and a severence would then take place and mechanically it would be worked out that he'd never go to trial.

Gwinn - All right now

Feffer - Our test Walt is simple to use him as a witness and a witness only

Gwinn - O.K. all right we're all set now now then - he knows what he's going to do, now I would appreciate it if he hangs up-I'm going to talk to him again in a minute, if he hangs up some place if you, he's real smart as to figures and things, but there's other areas that this man is not real smart.

Feffer - I understand ~~that~~ that -

Gwinn - Now if he hangs up some place I would appreciate it if you would let him pick up the phone and call me I'll stay here.

Feffer - We're probably not be going to Grand Jury until probably sometime in the afternoon.

Gwinn - Now you're going to take him back over there tonight aren't you?

Feffer - Yeah Yeah definitely.

Gwinn - For Christ sakes don't leave him over.

Feffer - Don't be silly.

Gwinn - Have they sentenced this man yet?

Feffer - Pacelli?

Gwinn - Yes

Feffer - No, as a matter of fact that was put over for a month - you know - for reasons you can understand.

Gwinn - Well, I have just about decided to try the murder case.

Feffer - Right

Gwinn - I don't have a damn thing to lose and my researchers tell me that under that new portion of that statute in that state I've got a shot to beat it and I don't have another damn thing to do but to try law suits and so I think, That I'll just come up wait till the spring is pretty and I'm going to bring me a staff of people up there, a couple of secretaries who like to get out with maybe one man and we're going to stay in your lovely country up there about a month and they can kiss by butt and but I tell you I'm going to call one more time and I I'm going to call

Feffer - I'll tell you, You'll have at least one spectator, I'll

Gwinn - Well good, all right, good luck, Gary

Feffer - Is any problem with the same individual - Joe Laurie who was there before talking to Barry today, then

Gwinn - Not a bit of it..

Feffer - O.K. good

Gwinn - Let me have the - whoever you just - make sure you get the names...

Feffer - Of any one who talks to him.

Gwinn - and you can send me the names of all the people.

Feffer - Very good

Gwinn - Good enough, Let me speak to him

Feffer - You want to talk to Barry, O.K.

Lipsky- Hello Mr. Gwinn

Gwinn - O.K. Pal You're on your own.

Lipsky - I have just one thing to ask you - I having a lot of difficulty sleeping. I get about 2hrs a night over there because of the noise factor and I got 4 tranquilizers to sleep through Friday but they don't do much good maybe the doctors on the outside could help me I can't seem to get the Dr. there to help me he thinks I'm kidding him along.

Gwinn - Well if there's so much racket, how you going to sleep?

Lipsky - That's just it I can't sleep cause the racket in the hallway - the guard's room there and there's an awful lot of noise they gave me tranquilizers only four little ones, valiums

Gwinn - Is there any place in the jail that's quieter?

Lipsky - I don't know.

Gwinn - Well, you want me to ask the warden?

Lipsky - You haven't done anything - I mean, you want me to remain over there I guess.

Gwinn - Oh yeah

Lipsky - for the time being

Gwinn - Oh you bet your ass

Lipsky - So I don't think there's a better place around.

Gwinn - Now listen don't you damn sure talk to none of them state officials about that murder case.

Lipsky - Oh no - no course

Gwinn - and I have told the man that you will talk to him about anything, you want to talk about that that they want to talk

(cut)

Lipsky - Grogan (spelled out)

Gwinn - and how did you know him?

Lipsky - How do I know him? He worked for that man in Miami that was on trial with me, the fat guy.

Gwinn - Dave?

Lipsky - Yeah

Gwinn - God damn, I bet that's who's been over to see me.

Lipsky - Who's that? - Oh you mean somebody's been over to see you?

Gwinn - All right I'm going to call the warden and tell him

Lipsky - O.K.

Gwinn - O.K. Pal

Lipsky - All right

Gwinn - All right

END OF CONVERSATION

Lipsky - Just the Federal people and ...

Gwinn - and that they have promised me that they will give you completely transactional immunity...

Lipsky - O.K.

Gwinn - and uh if you need a question asked anyplace along the line, they will permit you to pick up the phone to call me.

Lipsky - You see, I have a communications problem, I tried to reach Mr. Feffer yesterday I sent him a note, I don't know if he got it, but then they sent word last night that I was to come to the Federal, downtown today. There was about something he asked me the other day where like out of the blue a license plate number came to my head.

Gwinn - You remembered it.

Lipsky - Yeah, you know, I have a pretty good memory and it just came out of nowhere and I gave it to him today because it related to something we talked about when you were there Friday

Gwinn - All right fine.

Lipsky - The only other thing is I can't make any headway about getting anything to read I'm reading a 1954 National Geographic.

Gwinn - What do you want to read?

Lipsky - Well just the stuff they have in the library there I'd like to read the magazines and papers.

Gwinn - I'll take care of it, I'll call the warden.

Lipsky - Cause you know I have a lot of time on my hands, I can't - I sleep about 2 hours a night - that's about all

Gwinn - All right - I'll call the warden and when you get to the day - they'll let you give me call if you want to.

Lipsky - O.K. and what was I going to say - You'll be overthere until what time? 5 or 4?

Gwinn - They always know where I'm at.

Lipsky - All right now the only other thing is ...

Gwinn - You just make sure that they guard you.

Lipsky - Oh yeah, they're taking good care of me, you want me to remain over where I am - I stopped going to the yard after I saw that person I told you about - I didn't go there and of course I won't go to the movies today until that person gets out of there - I won't go out to the yard there anymore.

Gwinn - I think - you're right - what was that person's name?

Lipsky - Jimmy Grogan

Gwinn - Jimmy what?

...versation between Walter E. Gwinn ...ttorney of Miami, ... for Barry Lipsky, which attorney recorded this tele... conversation, talking to Assistant U.S. attorney Gary Feffer:

Gwinn - Hello Brother ... how are you?

Feffer - Good, how are ...

Gwinn - Well I just ha... call about ten minutes ago from Mr. Rosner

Feffer - (laughter)

Gwinn - and said that ... were going to trial on June 12th.

Feffer - Yes yup so you better get ready I guess.

Gwinn - Well I told him I don't know - he's insisting on on coming down here and seeing me and I told him I wasn't interested in that and that I wouldn't even be here as a matter of fact - he wanted to know if I represented the man and I said well I didn't take him to raise, I have a contract which signed that says that I'm to represent him ... in a murder case in Long Island in Mineola and he wanted to know if he's was cooperating with the Gov't and I said I don't know what he's doing cause I haven't been up there, but whatever you mean cooperate? I said I suppose he's trying to get the best deal he can for himself and I had a call from Nicholas Castellano that I had called, and I thought that I would probably use him, or his office. I checked the book here and he is a little older than I am and practiced there quite some time and was listed in Martindale Hubell as a good lawyer.

Feffer - Right

Gwinn - So then he called me yesterday and said, I hadn't told him anything about the case, but he told me that he had a feeler from the other Pacelli people about representing him but that Rosner had apparently bad-mouthed him pretty good -

Feffer - Yeah

Gwinn - and I told him that I would do nothing further then, because if he decided to take the other side of the coin then I obviously was going to have to seek help elsewhere and which is perfectly all right

Feffer - Right

Gwinn - I wanted him ... make a living for his family but uh, I think the... you know ... must be - they're getting on to something.

Feffer - Right - most definitely as I told you before, Walt, I can't tell you to be too careful with this guy.

Gwinn - (laughter) ... trying to be as careful as I possibly can because I told ... Castellano yesterday that according to my friends in the ... man's reputation - uh - course I don't pretend to ... fully white - but ...

Feffer - Yeah, well ...

to become involved.

Feffer - No, that's very wise.

Gwinn - Not only for that but for my client as well now uh - I asked him, I said - what - you know - what the hell'l that gov't is doing in court with my client yesterday and I wasn't notified, He said, well, that wasn't the way it was - just lawyers were there.

Feffer - Yeah

Gwinn - So - I told him, though, I haven't received any notice and I can not go to trial on June 12th and I'm preparing a big trial or at least a pretty good sized trial here down here June the 12th just can't go to trial - So he wanted to know if I would check and find out and let him know and I said, no I do, can't do, that either because I gave my word to Mr. Castellano that I wouldn't say to anybody anything until he made up his choice whether or not he wanted to be of assistance to me or to perhaps have an opportunity to make a lot more money then I could afford to pay him.

Feffer - Right (laughter)

Gwinn - Uh, I did get a letter yesterday from the day before yesterday from the District Attorney then I called the Judge' law clerk up as I think they call him or secretary or something.

Feffer - Yeah

Gwinn - I informed Mr. Rosner that I had not even read the statements so I was in absolutely no position to tellhim ...

Feffer - Right

Gwinn - Because I didn't know what was in the statements he said, well, you know you could sort of guess and I said well I don't know whether you can or not I said-I read where the District Attorney said my fellow killed a woman with a knife and burned up her body to do a friend a favor, I said I can state unequivocally that according to my client he didn't cut any - he didn't kill anybody.

Feffer - Right

Gwinn - So I says now I can't assume what's in the statements and I'm not going to assume them.

Feffer - Yeah, he's obviously trying to pull a pack or trying to...

Gwinn - Well he wants ...

Feffer - to find out through you what's in the statements

Gwinn - and he wants to of course have the man defend himself - I said, well you know if I can defend the man, I'll do it - I'd rather have him acquitted

Feffer - Sure

Gwinn - But if he can't, I said well I'll make the best deal I can for my client and I'll do that for anybody, even lawyers (laughter) so he just kind of hung and I told him I wouldn't know anything about anything until the first of the week because I was going to be out of town and do a little fishing maybe and whatever.

Feffer - Well - I'm glad to hear that - my posture with the Court and with Rosner on the June 12th date was that uh - the only thing I said so far on the record is that I contacted you and you were informed of the indictment against Mr. Lipsky and you had asked me to enter a not guilty plea cause you couldn't be present on the date of the arraignment and that's all that I said - Now Mr. Rosner will probably come in yelling and screaming that you can't make it up here on June 12th and I'll just, be firm and say that that's not a matter for Mr. Rosner to concern - if he wants to ...

Gwinn - How you going to work the severence on that?

Feffer - Well I'm going to do that the actual day of the trial.

Gwinn - Oh, were you?

Feffer - Yeah because I don't want them to know at this point anything in terms of possible cooperation or I want them to be under the impression at least that we're going to go ahead on June 12th.

Gwinn - I was just wondering if I,uh, you know in line with what that is if I should file something rather uh ...

Feffer - I don't think you really have to because ...

Gwinn - I would be glad too, if you thought that would help.

Feffer - No no I don't think you really have to, Walt, because, basically speaking I got ...

Gwinn - The first thing he's agoing ask me if I filed a motion for continuance or severance,

Feffer - Right

Gwinn - and I was - Cause I don't have to tell him a damn thing but if I don't tell him something that's the only thought I had, Gary, but uh uh ...

Feffer - That's of course a possibility - if you follow, you know it would be a very simple affidavit that you can't make it on that date and that moreover your client is detained on another charge elsewhere and it might be better to clear that one up first.

Gwinn - Yeah I might file some motion for ...

Feffer - You know, we would probably consent to that or we can - let me think on that for ...

Gwinn - Why don't you think on that

Feffer - O.K.

[illegible] would be my motion

Feffer - We would do this uh ...

Gwinn - Talk to somebody about that because you guys are getting to trial pretty soon I understand.

Feffer - Yeah, we're doing to actually you see, what I anticipated doing was to sever Lipsky on the day of trial.

Gwinn - That may not - If you catch a judge cold.

Feffer - No, that's no problem here at all

Gwinn - Yeah

Feffer - It's done fairly you know routinely - and you know, the theory behind that is that at least up to that point of time they would not be certain as to whether he was co-operating or not cooperating, but ...

Gwinn - Yeah I think this - I think they have already figured it out

Feffer - Oh yeah ...

Gwinn - and if he's smart, if he's smart, If I can make some motion up there, see I can say that this man is under indictment someplace else ...

Feffer - Right

Gwinn - and in order to testify he may and an crossexamination be subjecting himself to answers which may incriminate him in other pending matters, I can put what ever needs to be there...

Feffer - Yeah

Gwinn - to make it look real good.

Feffer - I think at this point, though, let me sort of mull it over

Gwinn - All right no rush

Feffer - I would think they can't on crossexamination anyway they have no right to go into ...

Gwinn - Well that's what - I'm positive that that's what they will do. As a matter of fact, now that I think about it, he intimated to me sort of with a left hand hook, coming from port side, that on crossexamination he would most certainly get into that.

Feffer - Well he knows he has no right, I mean the guy hasn't been convicted of anything, he's just accused of that he's ...

Gwinn - So I - he suggested that that would be a pretty pretty bad thing you see - so in any event it would be nice for me to know before that date in other words whether I even have to come up there or not ...

Feffer - O.K.

Gwinn - Mull that over and call me back.

Feffer - O.K. Now, Walt, actually the main reason I called was that in your call yesterday, on your suggestion, I went and I talked to my superiors here, a guy named Marlow ...

Gwinn - Oh yeah yes yes

Feffer - Now he's very interested in speaking with you directly and I told him that I would talk to you and ask when it would be possible for you to come up or if you're planning to come up in conjunction with the Lipsky, thing anyway and he's interested in speaking with you and I can't say what's on his mind but uh ...

Gwinn - Now is that the chief assistant you're talking about?

Feffer - Right and he's the individual who, as you referred to yesterday, could work on a higher level than I obviously, he could talk directly with Cahn

Gwinn - Oh I see

Feffer - I think it may be very worthwhile for you to explore this because ...

Gwinn - Well does he think I should - What's your thoughts about the timing? Should I come soon - relatively soon?

Feffer - I would say yes I would say yes.

Gwinn - Well Let's see now Let me look at my calendar now, next week I have uh... uh...

END OF CONVERSATION

and U.S. Assistant Gary Feffer - recorded by Walter E. Gwinn.
736 -9

Gwinn - Hi Joe

Feffer - How are you?

Gwinn - Well it's pretty good

Feffer - Good good (laughter)

Gwinn - Still breathing

Feffer - Did you talk to Morvillo yet?

Gwinn - I talked to him, and I'm, uh, he wouldn't say much over the phone and I'm supposed to come on the 31st.

Feffer - 31st?

Gwinn - Which is Wednesday - a week from Wednesday - and I have ...

Feffer - uh uh

Gwinn - I ...

Feffer - From what I can gather what's happening, it's, uh uh, the D.A.'s office out there in Nassau County is not in a hurry obviously.

Gwinn - No

Feffer - Uh and, you know, because they say, you know, we have one man and uh, you know, we'll pick a time to make the best possible case. Now off the records, uh I think your in a good bargaining position to push them, because your man is in jail.

Gwinn - mmm

Feffer - and the New York State Courts are in an uproar right now, especially with the legislature as to what to do in pushing cases to trial uh where the defendant is in jail and especially in a homicide situation.

Gwinn - Yeah - Well I uh - he didn't - I wasn't very uh uh - after talking to Morvillo. I wasn't in too - uh - I didn't think like they'd accomplished a hell of alot.

Feffer - Well - I think, I think one of the problems. of course, is that as Bob said, is that is that he just didn't want to talk on the phone to you.

Gwinn - Well - Maybe so ...

Feffer - Yeah Yeah

for a minute, I don't know, you know ...

Feffer - Yeah, I again, my, my impression is, as what they were doi is that they're not in a hurry and that you know, and this is this has been basically the whole problem - they aren't in a hurry and going to be pushed uh because they said the case isn't gonna go away uh meaning the case against Pacelli.

Gwinn - Yeah

Feffer - But uh I think, I think when you get up on the 31st that Bob can explain it in more detail to you.

Gwinn - Well I'm hoping that I can get something accomplished uh I keep filing motions and what not ...

Feffer - Right

Gwinn - and, of course, they're never accurate because I don't know anything about the rules but uh and they'll send them back and they'll do this or that but uh, of course, the ti is coming on and uh, is going on, and I don't want them to bounce me with the trial at the last minute and uh... ar

Feffer - What is the date set up now?

Gwinn - ... June 15th.

Feffer - Yeah, I would I bet my dollar that that they uh would try to move that back on you too.

Gwinn - But uh but and I've got June yeah, it is June the 15th and I've got another trial to schedule the same damn day as a matter of fact down here and then on the 21st - one of my bigger cases in Broward County, Florida.

Feffer - Right

Gwinn - Fort Lauderdale, but uh I uh was I told him I was in trials everyday this week and uh uh I didn't want to come Saturdays, you know, unless he thought it was that necessary...

Feffer - Right

Gwinn - Because I know he gets enough work, so he said that he was sure that it would wait until Wednesday the 31st ...

Feffer - Right, that's probably about the best thing - I uh ...

Gwinn - and uh , of course, Barry he's getting edgy and uh ...

Feffer - Yeah - I know he's uh uh tried, I think definitely he's becoming edgy - funny, you mentioned that because when, you know, when he was here the last time, it's more noticeable

Gwinn - Yeah, well that's the usual thing.

Feffer - Yeah

Gwinn - I'm more concerned about the guy's stability than ...

Feffer - That's what I mean ...

Gwinn - emotional stability I uh ...

Feffer - That's what I mean, yeah.

Gwinn - I uh I just uh if he, - cause this man's capable of going crazy as hell and in my judgment and I don't wanta - If he's gonna be any good, he's got to be competent like I said and uh uh I don't what the hell the waiting and laying around over there. I don't understand that at all.

Feffer - Well (laughter)

Gwinn - Has this man been sentenced in Federal yet?

Feffer - I think sentence is this afternoon. This afternoon at 4:30.

Gwinn - Later on huh?

Feffer - Yeah, I think he'll get get a pretty stiff sentence. So they they they won't be able to give you that excuse anymore. (laughter)

Gwinn - Well - What concerns me is if he gets a stiff sentence that they may say "Well that's enough for him...

Feffer - No I I ...

Gwinn - and we'll go just take the other guy and let Pacelli go to hell.

Feffer - No I ...

Gwinn - Don't think so huh?

Feffer - I think if you look at it realisticall,, let's assume that the statements were admitted, it would look kind of funny, how do you explain the fact that the individual who is accused of doing everything isn't around?

Gwinn - Well, that's right. I uh ...

Feffer - They have they have problems too, and it is just that uh again from where I understand they they're not in a hurry that they're just taking their good sweet time about it. uh, you know, who knows they may be waiting for the election year campaigns, you know, I don't know, coming up in November, I don't know what they're doing.

Gwinn - Oh boy, well if I needed something, I'd play the game with them, but if I can get my guy a radio or a little T.V. set or something ...

Feffer - Right Right Well I'm gonna go talk to Morvillo about that now.

Gwinn - Ask Morvillo if - uh - because this guy uh now some of his letters for example...

Feffer - Yeah

Gwinn - Then he'll write the next day and he'll be a completely different man.

Gwinn - and uh Now hi says he has absolutely nothing to do and he uh he has, where they have their mops and things like that that's what he uses for wash bowl, his toilet is a hole in the floor ...

Feffer - Yeah

Gwinn - Now this is just absolute maximum uh security but for the reverse reason ...

Feffer - Yeah

Gwinn - and uh I like to - ask Bob if he could call that guy and ask him if there is a place available - some cell that would have a toilet ...

Feffer - Right

Gwinn - Atleast a toilet and uh he says that many of the inmates are allowed to have radios and small T.V.'s.

Feffer - Right Right - I'm gonna go in and see Bob about that today, as a matter of fact ...

Gwinn - Well Good, I'd appreciate it and call me back cause I'm going to write this guy a letter and uh, cause he keeps uh, you know, he keeps saying well I'm not going to talk to anybody until I, I gotta know something, you know, I'm just staggering around here and nobody's doing anything for me - He gets real sorry for himself - and he gets mad at his mother and at me' ...

Feffer - Right

Gwinn - And, so I told him I was going to see what we could do about some, just a few luxories there.

Feffer - Fine - Let me go talk to Mervillo about that...

Gwinn - Now this guy, this warden seems to be a real nice guy.

Feffer - Yeah, I understand he used to be an agent with the Federal Bureau of Narcotics

Gwinn - And, as a matter of fact, he arrested Pacelli's father

Feffer - Yeah, Pacelli's father, right.

Gwinn - and, I think if Mervillo would talk to him, I think it would do the trick.

Feffer - Yeah, either that or someone from the Bureau of Narcotics who he know, you know, one of the old people from the Bureau.

Gwinn - One of the old timers.

Feffer - Yeah, No - I can appreciate the problem, of course, it worried me too because I saw him here Thursday ...

Gwinn - I'm just uh - He may come on good and he ain't no damn good to you or me either then.

Feffer - That's exactly right. As a matter of fact we're scheduled to go on trial on 12th on June 12th now in the first case that be made for us.

Gwinn - Yeah

Feffer - and so I have a direct interest in making sure that be not only personal interest but a direct interest in our...

Gwinn - Well, If I can get some committment, I'd have him up there - If I could get any committment at all out of them in Cahn's office then I could, we could lay your plans and if, of course,and keep it confidential ...

Feffer - Yeah

Gwinn - As to what they want to do if theywant to - uh - cause I told them that I'm reasonable for anything that's half reasonable why I'll - I'll go along with it - I'm having some control problems and,of course, they don't know that- and ...

Feffer - One thing is that you might - Rosner probably giving you a call - I can tell you now there's a date on that case is set for June June 12th so at least you'll know that.

Gwinn - All right

Feffer - He'll probably be asking you what you're going to do - you going to come here? What you're going to do and all this kind of thing.

Gwinn - Now what should I do?

Feffer - Well I mean I would just tell him that you're aware of the trial date that's been taken care of it - that's it - period.

Gwinn - In other words on trial date how will you, will you withdraw his name or how do you handle it up there?

Feffer - On that date what I would do I would get up that day in court say that we're not going to proceed against Barry Lipsky, that we're going to sever Barry Lipsky and that the other defendants will be on trial then without him.

Gwinn - Oh I see.

Feffer - and there, of course...

Gwinn - I won't necessarily have to be there, will I?

Feffer - I don't think you'll have to be there.

Gwinn - You could find out because if you do , of course, I'll need a little little notice because uh then, that's on Monday you see

Feffer - Yeah, no, I can't imagine that you'd have to be up here for that, you know, unless you wanted to.

Gwinn - Well, you can tell somebody there that maybe the judges law clerk or somebody ...

Feffer - Yeah

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Gwinn - What you plan to do if you're ...

Feffer - Well, I already have told him he's fully aware of [illegible] as a matter of fact, he knows what's happening, and he even ask me for your address and telephone number [illegible] communication I can handle with you directly.

Gwinn - Well that's good

Feffer - from him - so he's aware of what's happening.

Gwinn - All right now well let's see go talk to Morvillo and tell him - I think maybe he he doesn't understand radius because you've seen this guy from start to now and there is a change happening ...

Feffer - No question about that.

Gwinn - and as a matter of fact his mother wants to now really pressure me to have him examined and I certainly don't want to do that.

Laughter.

That's the worse thing I could do - but I can't explain that to her or to him

Feffer - Right

Gwinn - I'll just have to set here and talk to myself about it except when you and I gab a little but time is not really of the essence but still it's just a needless waste of..

Feffer - Well, uh ...

Gwinn - or if they'd even tell me look if you want to wait and do us a favor and election time'sin November whatever they want to do.

Feffer - Yeah

Gwinn - And then we're going to do this and thus and so, fine, but if this guy knew what was coming ...

Feffer - Well, I'd be ...

Gwinn - He'd be better off I think

Feffer - I think again, you know, it's obviously your decision but I'm not so sure that I'd be inclined to let them, you know, hold on forever I think you have a right to push them and personally ...

Gwinn - I'm just a little afraid, as I told you, if this guy gets the hilt they may do ...

Feffer - Oh no, I think they will that they have problems I think that they will go after Pacelli eventually but I think..

END OF CONVERSATION

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNTIED STATES OF AMERICA	No. 73 Cr. 881
Vs.	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PSYCHIATRIC EXAMINATION OF BARRY LIPSKY
VINCENT PACELLI, Jr.	

This court has authority to grant a mental examination of a prospective prosecution witness. Carrado v. United States, 210 F.2d 712, 721 (D.C. Cir. 1954), United States v. Butler, 481 F.2d 531 (D.C. 1973). As stated in the leading case on the subject, a court has inherent power to order pre-trial psychiatric examination of a prosecution witness on the question of competency or credibility, and such orders should be granted where there is reasonable doubt as to the capacity of credibility of the witness. State v. Butler, 27 N.J. 560, 143 A. 2d 530 (1958). Such orders "should be executed only upon a substantial showing of need and justification . . . (and) much reliance must be placed upon the judgment of the trial court in the individual case . . . For the present we go no farther than to say that in this instance the circumstances patently called for such an order." Id. A. 2d at 556 (The trial court was reversed for refusing defendant's request to submit a prosecution witness to psychiatric examination). As the D.C. Circuit recently said,

> "To assist the court in making its competency decision, to aid the jury in assessing credibility, or to serve both purposes, the trial judge may order a psychiatric examination to obtain expert testimony concerning the degree and effect of a witness's disability.
>
> United States v. Benn, 476 F.2d 1127, 1130 (D.C. 1973).

It is thus clear that a prima facie showing of incompetency is not necessary to warrant an examination. It should be enough that evidence exists which would cast some doubt upon either credibility or competency, and it appears likely that a psychiatric evaluation would be useful in the search for truth.[1]

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1. See generally, supporting liberalization of pre-trial psychiatric examination of dubious prosecution witnesses, Conrad, Mental Examination of Witnesses, 11 Syracuse L. Rev. 149 (1960); Weihoffen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53, 75 (1965); Slovenko, Witnesses, Psychiatry and the Credibility of Testimony, 19 U. Of Fla. L. Rev. 1 (1966); Comment, 59 Yale L.J. 1324 (1950); 9 Rutgers L. Rev. 330 (1958); Anno, Psychiatric Examination of Complaining Witness, 18 A.L.R. 2d 1433

Lipsky's lengthy use of cocaine should itself meet this test.

The D.C. Circuit Court recently observed; citing medical sources:

> Current medical knowledge indicates that use of narcotics often produces a psychological and physiological reaction known as an acute brain syndrome, which is a "basic mental condition characteristic of diffuse impairment of brain tissue function." The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual functions including comprehension, calculation, knowledge and learning; impairment of judgment; and lability and shallowness of affect.
>
> Hansford v. United States, 365 F.2d 920, 922 (D.C. 1966).

And with respect to cocaine users in particular, it has been noted that

> "Prolonged and heavy cocaine use can produce severe psychological and physiological effects. One frequent psychological result is hallucinations. In some cases, prolonged use causes paranoid delusions. Some commentators claim that in these states of hyperexcitement and paranoi, the cocaine user is extremely dangerous and potentially violent."
>
> McLaughlin, Cocaine: The History and Regulation of a Dangerous Drug, 58 Cornell L. Q. 537, 551 (1973).

No jury is competent without expert assistance to determine the extent to which such impairments have occurred in a particular witness, and abstract monologues by an expert, unrelated to a particular witness, would be of little help.

> "The effects of narcotic use will vary depending on the amount of drugs taken, the degree or tolerance developed by the individual, and the idiosycratic reaction of the person to the drugs. For this very reason, only by a hearing can it be determined whether any particular defendant is incompetent because of his use of drugs."
>
> Hansford v. United States, supra, at 923.

Of course, there is much more here than long use of cocaine. Lipsky's attorney, cooperating at the time with the Government, expressed serious doubts about his sanity. The Assistant United States attorney was concerned about Lipsky's emotional stability and worried about his mental condition. The attorney subsequently swore to Lipsky's incompetence.

Not only Lipsky's bizarre behavior in the past few years, but his apparent inability to refrain from committing perjury, would raise serious doubts about his credibility even without the other facts.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA V. VINCENT PACELLI, JR.	No. 73 Cr. 861 MOTION TO DISMISS INDICTMENT FOR FORMER JEOPARDY, VIOLATION OF DUE PROCESS AND SPEEDY TRIAL

Defendant respectfully moves the Court to enter an order dismissing the indictment for the following reasons:

A. With respect to Count 1

1. The offense charged is the same offense for which the defendant was put in Jeopardy and convicted in 71 Cr. 614;

2. The offense charged is the same offense which was dismissed as Count 1 of indictment number 72 Cr. 612 on the ground it twice put me in Jeopardy for the same offense, and the prior dismissal is res judicata in this case.

3. The offense charged is the same offense for which I was placed in jeopardy in the trial of 73 Cr. 441, which Jeopardy was not waived by me.

4. The facts constituting this offense, and the evidence to be offered to support it were known to and available to the Government in February, 1972, prior to my indictments in 72 Cr. 612, 72 Cr. 664, 72 Cr. 1319, 73 Cr. 330, 73 Cr. 441 and the instant case, and should have been alleged and litigated in early 1972, as part of the first indictment, i.e. 72 Cr. 612. The failure to litigate these issues earlier, if indeed they were not litigated as alleged in paragraphs 1, 2 and 3 above, was unwarranted, unjustified, and a violation of defendant's right to Due Process of Law and Speedy Trial.

5. The Count is in violation of a solemn promise and representation of the Government, and a condition under which defendant consented to a mistrial in 72 Cr. 1319 , in that it names numerous co-conspirators, numerous co-defendants, numerous overt acts, and a period of time to conspiracy in 72 Cr. 664, which was the only conspiracy, if any, upon which the defendant could be put to trial subsequent to December 21, 1972. The count is in further violation of said solemn promise and representation in that it is joined with numerous other substantive counts, contrary to the agreement.

6. The indictment of defendant on this count is part of a program of vexation and harrassment against the defendant, involving the splintering of prosecutions and the proliferation of charges all having the same evidentiary source and with no justification whatever.

B. With respect to Counts 2, 3, 4, 5, 6 and 7

1. The facts constituting these offenses, and the evidence to be offered to support them were known to and available to the Government in February, 1972, prior to my indictments in 72 Cr. 612, 72 Cr. 664, 72 Cr. 1319, 73 Cr. 330, 73 Cr. 441 and the instant case, and should have been alleged and litigated in early 1972, as part of the first indictment, i.e. 72 Cr. 612. The failure to litigate these issues earlier, if indeed they were not litigated, was unwarranted, unjustified, and a violation of defendant's right to Due Process of Law and a Speedy Trial.

2. Each Count is in violation of a solemn promise and representation of the Government, and a condition under which defendant consented to a mistrial in 72 Cr. 1319, in that they constitute additional charges, the evidence for which was in the Government's possession and known to the Government but not contemplated by the defendant or by the agreement at the time it was made. The only substantive charges, if any, to which the defendant remained subject to prosecution, pursuant to that agreement were the substantive charges alleged in 72 Cr. 664, none of which are contained in the present indictment.

3. The substantive counts were in essence overt acts in furtherance of the conspiracies alleged in 71 Cr. 614, 72 Cr. 612, and 73 Cr. 441 and as such are subject to dismissal on former Jeopardy grounds to the same extent and for the same reasons the conspiracy count in this indictment is subject to dismissal, i.e. for the reasons set forth in paragraphs 1, 2 and 3 in A. above.

WHEREFORE, Defendant demands that the indictment herein be dismissed.

Respectfully submitted,

Steven B. Duke
127 Wall Street
New Haven, Conn.
06520

Attorney for Defendant Pacelli

Dated November 21, 1973

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA V. VINCENT PACELLI, JR.	No. 73 Cr. 881 AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR FORMER JEOPARDY AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SPEEDY TRIAL RIGHT

VINCENT PACELLI, JR., being first duly sworn, states as follows:

1. I am the defendant in the above captioned and numbered case and submit this affidavit in support of my motion to dismiss the indictment.

2. I was indicted in 71 Cr. 614, in the Southern District of New York, on or about May 12, 1971. I was there charged with conspiring with Papadakos, Jalaba, Possas and others unknown to distribute narcotics in violation of 21 U.S.C. §812, 841 between January 1, 1971 and June 14, 1971. Various substantive counts alleged distribution of cocaine and heroin during the month of May, 1971. I went to trial in this case before Judge Pollack and a jury in February 8, 1972. I was acquitted on Count III, which charged distribution of heroin, and convicted on the other counts. I was sentenced to serve twenty years in prison, placed on special parole for three years,,and fined $10,000. A copy of that indictment is attached hereto.

3. I was indicted a second time, on or about May 12, 1972, in 72 Cr. 612. A copy of that indictment is attached hereto. That indictment charged me, in Count I, with conspiring, from September, 1971, until May 12, 1972, with Peter Aponte, Barry Lipsky, Nicholas Lugo, Albert Perez, and "others to the Grand Jury unknown" to violate 21 U.S.C. §812, 841. Count II charged me with distributing cocaine with Lipsky and Nicholas Lugo in October, 1971. Count III charged sitribution of cocaine on November 18, 1971, with Aponte, Lugo and Perez.

On October 31, 1972, I moved for an order dismissing the conspiracy count, Count I, on the ground it twice put me in jeopardy for the the same offense. I argued that there was an "identity of times, objects, and persons alleged as part of a conspiracy in the respective "indictment (i.e. 71 Cr. 614 and 72 Cr. 612. See affidavit of Stanley Arkin, October 31, 1972, submitted in 72 Cr. 612). This motion to dismiss, on this ground, was granted with the consent of the Government. See affidavit of Stanley Arkin, December 7, 1972, submitted in support of motion to dismiss in 72 Cr. 612.

4. I was again indicted, in 72 Cr. 664, on June 5, 1972. That indictment charged me, in Count I, with conspiring from September 28, 1971 to June 5, 1972, to distribute narcotics in violation of 21 U.S.C. §§812, 841, with Luis Valentine, Barry Lipsky, Octavio DelBusto, Nelson Garcia, Rafael Rojas, Albert Gonzales and "others to the Grand Jury unknown." Count II charged me with distributing and possessing cocaine on or about September 28, 1971, with Valentine, Lombardero and Lipsky. A copy of that indictment is attached hereto. I was tried on this indictment before Judge Gagliardi in June, 1972, convicted, and sentenced to fifteen years in prison.

5. After agreeing to dismiss Count I of indictment numbered 72 Cr. 612, the Government superseded that indictment on December 4, 1972, with indictment number 72 Cr. 1319. That indictment, a copy of which is attached, is virtually identical to indictment 72 Cr. 612, except that I was no longer named as a defendant in Count I, the conspiracy count.

I went to trial on this indictment before Judge Gagliardi, on December 18, 1972. On the first day of trial, in the course of cross-examining Lipsky, my counsel apprised the court that he had tapes which proved that Lipsky had committed perjury against me (Tr. October 18, 1972, in 72 Cr. 1319, pp. 81 et seq). As a result of this disclosure, the trial was postponed for three days while counsel discussed the appropriate disposition of the matter.

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6. During the three day hiatus in the trial, my attorney Mr. Arkin advised me of his negotiations with the United States Attorney's Office. He told me that the office was very anxious not to have spread on the public record the fact that Lipsky had committed perjury and that one of the Assistant United States Arrorneys, and possibly others, had knowingly suborned and condoned the perjury (Lipsky had committed the same perjury in 72 Cr. 664, denying he had ever discussed leniency with anyone, when in fact, he and his attorney had made a "verbal contract of transactional immunity" with the prosecutor, Mr. Feffer, and Mr. Feffer had argued to the jury in 72 Cr. 664 that Lipsky's denial of any consideration, understanding or deal was the truth) Mr. Arkin urged me to consent to a mistrial, advising me that it was very unlikely that the Government would retry either 72 Cr. 1319 or 72 Cr. 664, both because it would result in exposing the Government's condonation of perjury and because Lipsky would have no credibility. I insisted that I wanted to go on with the trial, to get a verdict. Mr. Arkin persisted in his advice, even consulted with my uncle and my father, and brought another attorney into the picture, who also advised me to consent to the mistrial. I finally, reluctantly, consented, in reliance upon Mr. Arkin's advice and upon the conditions which he had worked out with the court and the Government. Those conditions were spread on the record, and the relevant transcript is attached hereto. I understood the agreement then, and so understand it now, to mean, among other things, that the Government promised me, in consideration of my consenting to the mistrial, that 72 Cr. 664 and 72 Cr. 1319 would be tried together, that no other counts would be added and there would be no new indictments based upon information then available to the Government. In short, I would be subject to trial only on 72 Cr. 664 (assuming the conviction was set aside) with an additional count reflecting some of the charges in 72 Cr. 1319. Furthermore, I could not receive a sentence of greater than fifteen years on any of the charges (Tr. p.160).

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7. Thereafter, on March 1, 1973, my conviction in 72 Cr. 664 was set aside. On that occasion, Mr. Nields, for the Government, stated that "the Government intends to prosecute the same indictment." Tr. of March 1, 1973, in 72 Cr. 664, p.9.

8. On April 13, 1973, only six weeks later, I was indicted in a 26 defendant, eleven count indictment, charging me, again, with conspiring to distribute narcotic drugs in violation of 21 U.S.C. §§812,841, from January 1, 1971 to the date of the indictment. Since it has subsequently appeared in various trials (73 Cr. 105, 73 Cr. 441) that virtually the only witness against me is Barry Lipsky and that he has been cooperating with the Government since February, 1972, it is clear that the evidence upon which this indictment, 73 Cr. 330, was based, the testimony of Lipsky, was in the possession of, available to, and known to the Government at least a year before the indictment and well before the agreement made in 72 Cr. 1319 on December 21, 1972.

9. Thereafter, indictment 73 Cr. 441 was issued, superseding indictment 73 Cr. 330. A copy of that indictment is attached hereto. In Count I, it like the indictment in 71 Cr. 614, upon which I have already been convicted and sentenced, charges me with conspiring with various persons, several of whom are the same, to violate 21 U.S.C. §812,841. This indictment, like the one in 71 Cr. 614, charges that the conspiracy occurred from January 1, 1971, to date. This count is therefore not essentially different from Count 1 of the indictment in 72 Cr. 612, which was dismissed on double jeopardy grounds. It too should be dismissed on those grounds.

10. I went to trial on 73 Cr. 441, before Judge Pollack on July 15, 1973, over my objections on Double Jeopardy and Due Process grounds. Prior to trial, I had also prepared an affidavit, which was submitted in support of a severance motion on behalf of co-defendants Frank and Antoinette Bassi, wherein I indicated that I was prepared to give exculpatory testimony on their behalf

if, and only if, I was tried separately and my case was disposed of first. After more than two weeks of trial, the court granted a mistrial as to me, under circumstances set forth in my Affidavit in Support of Motion to Dismiss for Violation of Fifth Amendment Rights, dated November 21, 1973, which is incorporated herein by reference. My attorney, Mr. Balliro, consented to the mistrial on my behalf; I did not; nor did I consent in private conversations with him.

11. Since my mistrial was declared, I have been told that the mistrial was granted as a result of an ex parte request made to the Judge by the Assistant United States Attorneys, who requested that I be mistried because if I were not, they could not sustain on appeal the anticipated convictions of Frank and Antionette Massi.

_____

Vincent Pacelli, Jr.

Subscribed and sworn to before me this ____day of November, 1973.

_____

: 71 J.F.K.o

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

VINCENT PACELLI,
DEMETRIOS PAPADAKOS,
a/k/a JAMES PAPAS,
DEVERLY JALARA and
ELEUA POSSAS,

Defendants.

INDICTMENT

71 Cr. 614

The Grand Jury charges:

1. From on or about January 1, 1971 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere,

VINCENT PACELLI
DEMETRIOS PAPADAKOS
DEVERLY JALARA and
ELEUA POSSAS,

the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 812 and 841 of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants, unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

JMH:ko-2-

1. On or about May 3, 1971 Elisa Possas delivered approximately 1/8 kilogram of cocaine at 425 East 62nd Street, New York, New York.

2. On or about May 20, 1971 Elisa Possas had a telephone conversation with Vincent Pacelli.

3. On or about May 20, 1971 Elisa Possas delivered approximately 1/2 kilogram of heroin to John Lepore.

4. On or about May 21, 1971, Vincent Pacelli walked to 370 East 76th Street, New York, New York.

(Title 21, United States Code, Sections 812, 841 (a)(1), 841 (b)(1)(A) and 846).

COUNT TWO

On or about May 3, 1971, in the Southern District of New York

ELISA POSSAS and
VINCENT PACELLI

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 110.13 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812 841 (a) (1) and 841 (b)(1)(A);
Title 18, United States Code, Section 2) .

COUNT THREE

From or about May 10, 1971 to May 20, 1971 in the Southern District of New York,

ELISA POSSAS,
VINCENT PACELLI and
DIMITRIOS PAPADAKOS

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic controlled substance, to wit, approximately 470 grams of heroin hydrochloride.

(Title 21, United States Code, Section 812, 841 (a)(1) and 841 (b)(1)(A); Title 18, United States Code, Section 2).

COUNT FOUR

On or about May 21, 1971, in the Southern District of New York.

BEVERLY JALARA and
VINCENT PACILLI

the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute, a Schedule II, narcotic controlled substance, to wit, approximately 11.83 grams of cocaine.

(Title 21, United States Code, Sections 812, 841 (a)(1) and 841 (b)(1)(A)).

COUNT FIVE

On or about May 20, 1971, in the Southern District of New York,

[illegible] and
VINCENT PACILLI

the defendants, unlawfully, wilfully and knowingly did use a communication facility, to wit, telephones in committing and in causing and facilitating the commission of an act constituting a felony under Section 841, Title 21, United States Code, to wit, the act charged in Count Three of this indictment.

(Title 21, United States Code, Sections 843 (b) and 841).

Foreman

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

ONLY COPY AVAILABLE

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GAF:rs
72-0206

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

PETER APONTE,
BARRY LIPSKY,
NICHOLAS LUGO,
VINCENT PACELLI, JR., and
ALBERT PEREZ, a/k/a Albert Rodriguez,
a/k/a Abbe,

Defendants.

72 CRIM. 612

INDICTMENT

72 Cr.

U.S. DISTRICT COURT
FILED
MAY 18 1972
S. D. OF N. Y.

The Grand Jury charges:

1. From on or about the 1st day of September, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, PETER APONTE, BARRY LIPSKY, NICHOLAS LUGO, VINCENT PACELLI, JR., and ALBERT PEREZ, a/k/a Albert Rodriguez, a/k/a Abbe, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

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2-0206

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about October, 1971, VINCENT PACELLI, JR., and BARRY LIPSKY met at the Yellowfingers Cafe, 1009 Third Avenue, New York, New York.

2. In or about October, 1971, BARRY LIPSKY delivered a quantity of cocaine to NICHOLAS LUGO.

3. On November 18, 1971, PETER APONTE, NICHOLAS LUGO and ALBERT PEREZ met at L & A Sporting Goods, 2147 Third Avenue, New York, New York.

4. On November 18, 1971, PETER APONTE delivered a quantity of cocaine to Special Agent Joseph Salvemini.

5. On or about November 18, 1971, VINCENT PACELLI, JR. met BARRY LIPSKY.

6. On November 29, 1971, NICHOLAS LUGO and PETER APONTE met with Special Agent Joseph Salvemini at L & A Sporting Goods, 2147 Third Avenue, New York, New York.

(Title 21, United States Code, Section 846)

SECOND COUNT

The Grand Jury further charges:

In or about October, 1971, in the Southern District of New York, VINCENT PACELLI, JR., BARRY LIPSKY and NICHOLAS LUGO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, cocaine hydrochloride, the amount thereof being unknown to the Grand Jury.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2)

THIRD COUNT

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, PETER APONTE, NICHOLAS LUGO and ALBERT PEREZ, a/k/a Albert Rodriguez, a/k/a Abbe, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2)

Richard Eberhardt
Foreman

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

PETER APONTE, BARRY LIPSKY, NICHOLAS LUGO, VINCENT PAGELLI JR., and ALBERT PEREZ a/k/a ALBERT RODRIGUEZ a/k/a ABBE

INDICTMENT 72 Cr.

Narcotics

(21 USC §§ 812, 841(a)(1), 841(b)(1)(A) and 846.)

WHITNEY NORTH SEYMOUR, Jr.

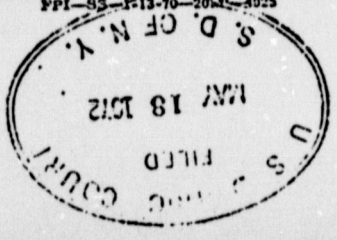
United States Attorney

A TRUE BILL

.....

Foreman

FPI—S3—1-13-70—20M—4025



MAY 18 1972 Indictment ordered sealed

Peter Aponte
Nicholas Lugo
Albert Perez } Warrants of arrest ordered issued. Croake, J.

SEP 11 1972 - Indictment ordered unsealed.

Peter Aponte - (atty present) Deft pleads N.G.
Bail cont'd.

Nicholas Lugo (atty present) Deft pleads N.G.

Vincent Pagelli - Bail cont'd.

Bail fixed in the amount of $75,000 each & secty. Cont'd to
date of N.G.

Barry Lipsky } Court enters plea of
Albert Perez } N.G.

WBG - Gagliardi, J.

MAY 25, 1973 ALL DEFTS. - Entered + filed Nolle Prosequi.

GAGLIARDI, J.

RW

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GAF:dat

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	72 CRIM. 664
-v-	:	
VINCENT PACELLI, Jr., LUIS VALENTINE, a/k/a Ramon Lombardero, BARRY LIPSKY, OCTAVIO del BUSTO, NELSON GARCIA, and RAFAEL ROJAS,	:	INDICTMENT 72 Cr.
Defendants.	:	

U.S. DISTRICT COURT
FILED
MAR 5 1972
S.D. OF N.Y.

The Grand Jury charges:

1. From on or about the 28th day of September, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, VINCENT PACELLI, Jr., LUIS VALENTINE a/k/a Ramon Lombardero, BARRY LIPSKY, OCTAVIO del BUSTO, NELSON GARCIA and RAFAEL ROJAS, the defendants, and ALBERTO GONZALEZ, named as a co-conspirator but not as a defendant, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the

WILSON

exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about September 28, 1971, defendants VINCENT PACELLI, Jr., LUIS VALENTINE and BARRY LIPSKY met at Yellow Fingers Cafe, 1009 Third Avenue, New York, New York.

2. On or about October 18, 1971, defendants LUIS VALENTINE, OCTAVIO del BUSTO, NELSON GARCIA, RAFAEL ROJAS and co-conspirator ALBERTO GONZALEZ went to the vicinity of the Castillian Room Bar, 303 East 56th Street, New York, New York.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846.)

SECOND COUNT

The Grand Jury further charges:

On or about the 28th day of September, 1971, in the Southern District of New York, VINCENT PACELLI, Jr., LUIS VALENTINE a/k/a Ramon Lombardero and BARRY LIPSKY,

GAG:dat

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, cocaine hydrochloride, the exact amount thereof being to the Grand Jury unknown.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

On or about the 18th day of October, 1971, in the Southern District of New York, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO del BUSTO, NELSON GARCIA and RAFAEL ROJAS, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 303.5 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

FOURTH COUNT

The Grand Jury further charges:

On or about the 18th day of October, 1971, in the Southern District of New York, OCTAVIO del BUSTO, NELSON GARCIA, and RAFAEL ROJAS, the defendants, unlawfully,

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GAF:kj

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1319

UNITED STATES OF AMERICA,

-v-

PETER APONTE, BARRY LIPSKY, NICHOLAS LUGO, VINCENT PACELLI, Jr., and ALBERT PEREZ, a/k/a Albert Rodriquez, a/k/a Abbe,

Defendants.

INDICTMENT

S. 72 Cr.

FILED
MAR 4 1972
S.D. OF N.Y.

The Grand Jury charges:

1. From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, PETER APONTE, NICHOLAS LUGO and ALBERT PEREZ, a/k/a Albert Rodriquez, a/k/a Abbe, the defendants, and Vincent Pacelli, Jr., and Barry Lipsky, named as co-conspirators but not as defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

1319

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OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On November 18, 1971, PETER APONTE delivered a quantity of cocaine to Joseph Salvemini, an undercover agent, in L & A Sporting Goods, 2147 Third Avenue, New York, New York.

2. On November 18, 1971, ALBERT PEREZ entered an inner room of L & A Sporting Goods.

3. On November 18, 1971, NICHOLAS LUGO had a conversation with Joseph Salvemini, an undercover agent, in L & A Sporting Goods.

4. On November 29, 1971, NICHOLAS LUGO and PETER APONTE met with Joseph Salvemini, an undercover agent, at L & A Sporting Goods.

(Title 21, United States Code, Section 846)

SECOND COUNT

The Grand Jury further charges:

In or about October, 1971, in the Southern District of New York, VINCENT PACELLI, JR., BARRY LIPSKY and NICHOLAS LUGO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, cocaine hydrochloride, the exact amount thereof being unknown to the Grand Jury.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.)

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THIRD COUNT

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, PETER APONTE, NICHOLAS LUGO and ALBERT PEREZ, a/k/a Albert Rodriguez, a/k/a Abbe, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.)

Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

WMP,Jr.:lq

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-v-

HERBERT SPERLING,
BEN MALLAH,
NORMAN GOLDSTEIN, a/k/a Sonny Gold,
JACK BLESS,
EDWARD BLESS,
VINCENT PACELLI, JR.,
NICHOLAS CUCCINELLO, a/k/a "Nicky Red",
ISMAEL TORRES,
PETER SALANARDI,
COURTLAND SAMPLE, a/k/a "Bucky",
JOSEPH CONFORTI,
SAM KAPLAN,
CECILE SPERLING,
JOHN NEGRON,
FRANK BASSI, JR.,
ANTOINETTE BASSI,
ALBERT PEREZ, a/k/a Abbe Perez,
FRED BERGER,
AL BRACER,
FRANK SERRANO,
EDGARDO RAMIREZ,
LUIS VALENTINE, a/k/a Ramon Lombardero,
OCTAVIO DEL BUSTO,
NELSON GARCIA,
SUSAN WEYL and
JOHN DOE, a/k/a "Sal",

Defendants.

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INDICTMENT

73 Cr. 330

Filed 4/13/73

The Grand Jury charges:

From on or about the 1st day of January, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH, NORMAN GOLDSTEIN, a/k/a Sonny Gold, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., NICHOLAS CUCCINELLO, a/k/a "Nicky Red", ISMAEL TORRES, PETER SALANARDI, COURTLAND SAMPLE, a/k/a "Bucky", JOSEPH CONFORTI, SAM KAPLAN, CECILE SPERLING, JOHN NEGRON, FRANK BASSI, JR., ANTOINETTE BASSI,

ALBERT PEREZ, a/k/a Abbe Perez, FRED BERGER, AL BRACER, FRANK SERRANO, EDGARDO RAMIREZ, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO DEL BUSTO, NELSON GARCIA, SUSAN WEYL and JOHN DOE, a/k/a "Sal", the defendants, and Louis Mileto, Carlos Lombardi, Nicholas Lugo, Peter Aponte, Barry Lipsky and Alberto Gonzalez, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about May, 1971, defendant FRANK SERRANO transported approximately one-half kilogram of cocaine to the vicinity of 78th Street and Lexington Avenue, New York, New York. A-L-E

2. In or about August, 1971, defendant JOHN NEGRON delivered to defendant VINCENT PACELLI, JR. one kilogram of cocaine. B

3. In or about July, 1971, defendant EDGARDO RAMIREZ delivered two cans of lactose to 1420 Third Avenue, New York, New York. B+E

4. In or about September, 1971, defendant JACK BLESS exited a building on West 96th Street, New York, New York carrying five kilograms of heroin. B

5. On or about October 18, 1971, defendants LUIS VALENTINE, OCTAVIO DEL BUSTO, NELSON GARCIA and co-conspirator Alberto Gonzalez went to the vicinity of the Castillian Room Bar, 303 East 56th Street, New York, New York.

6. In or about November, 1971, defendant HERBERT SPERLING delivered to defendant VINCENT PACELLI, JR. two kilograms of heroin. Sperling B+L or E or C

7. In or about November, 1971, co-conspirator Barry Lipsky delivered to defendant SUSAN WEYL two kilograms of heroin. R+S

8. On or about August 16, 1972, defendant HERBERT SPERLING met with defendant BEN MALLAH in the vicinity of 844 Seventh Avenue, New York, New York. Sperling

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9. On or about September 20, 1972, defendants HERBERT SPERLING and NORMAN GOLDSTEIN, a/k/a Sonny Gold, met in the vicinity of 844 Seventh Avenue, New York, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about the month of May, 1971, in the Southern District of New York, FRANK SERRANO and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-half kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

In or about the month of September, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., ALBERT PEREZ, a/k/a ABBE PEREZ, EDUARDO RAMIREZ and AL BRACER, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2)

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COUNT SIX

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JOHN NEGRON and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT SEVEN

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT EIGHT

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

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COUNT NINE

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, JOHN NEGRON, VINCENT PACELLI, JR., HERBERT SPERLING and BEN MALLAH, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TEN

The Grand Jury further charges:

On or about the 18th day of October, 1971, in the Southern District of New York, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO del BUSTO and WILSON GARCIA the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 303.5 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT ELEVEN

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, ALBERT PEREZ, a/k/a Abbe Perez, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled

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substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A); Title 18, United States Code, Section 2.)

FOREMAN

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

JFL:zg

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

HERBERT SPERLING,
BEN MALLAH,
NORMAN GOLDSTEIN, a/k/a Sonny Gold,
JACK BLESS,
EDWARD BLESS,
VINCENT PACELLI, JR.,
NICHOLAS CUCCINELLO, a/k/a "Nicky Red",
ISMAEL TORRES,
PETER SALANARDI,
COURTLAND SAMPLE, a/k/a "Bucky",
JOSEPH CONFORTI,
SAM KAPLAN,
CECILE SPERLING,
JUAN SERRANO, a/k/a John Negron,
FRANK BASSI, JR.,
ANTOINETTE BASSI,
ALBERT PEREZ, a/k/a Abbe Perez,
FRED BERGER,
AL BRACER,
FRANK SERRANO,
EDGARDO RAMIREZ,
LUIS VALENTINE, a/k/a Ramon Lombardero,
OCTAVIO DEL BUSTO,
NELSON GARCIA,
SUSAN WEYL and
SALVATORE RUGGIERO,
JACK SPADA,
JOHN DOE, a/k/a "Eddie",

Defendants.

INDICTMENT

S 73 Cr. 441

The Grand Jury charges:

From on or about the 1st day of January, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH, NORMAN GOLDSTEIN, a/k/a Sonny Gold, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., NICHOLAS CUCCINELLO, a/k/a "Nicky Red", ISMAEL TORRES, PETER SALANARDI, COURTLAND SAMPLE, a/k/a "Bucky", JOSEPH CONFORTI, SAM KAPLAN, CECILE SPERLING,

JUAN SERRANO, a/k/a John Negron, FRANK BASSI, JR., ANTOINETTE BASSI, ALBERT PEREZ, a/k/a Abbe Perez, FRED BERGER, AL BRACER, FRANK SERRANO, EDGARDO RAMIREZ, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO DEL BUSTO, NELSON GARCIA, SUSAN WEYL, SALVATORE RUGGIERO, JACK SPADA and JOHN DOE, a/k/a "Eddie", the defendants, and Louis Mileto, Carlo Lombardi, Nicholas Lugo, Peter Aponte, Barry Lipsky and Alberto Gonzalez, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and

possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, thefollowing overt acts were committed in the Southern District of New York:

1. In or about May, 1971, defendant FRANK SERRANO transported approximately one-half kilogram of cocaine to the vicinity of 78th Street and Lexington Avenue, New York, New York.

2. In or about August, 1971, defendant JUAN SERRANO, a/k/a John Negron delivered to defendant VINCENT PACELLI, JR. one kilogram of cocaine.

3. In or about July, 1971, defendant EDGARDO RAMIREZ delivered two cans of lactose to 1420 Third Avenue, New York, New York.

4. In or about September, 1971, defendant JACK BLESS exited a building on West 96th Street, New York, New York carrying five kilograms of heroin.

5. On or about October 18, 1971, defendants LUIS VALENTINE, OCTAVIO DEL BUSTO, NELSON GARCIA and co-conspirator Alberto Gonzalez went to the vicinity of the Castillian Room Bar, 303 East 56th Street, New York, New York.

6. In or about November, 1971, defendant HERBERT SPERLING delivered to defendant VINCENT PACELLI, JR. two kilograms of heroin.

7. In or about November, 1971, co-conspirator Barry Lipsky delivered to defendant SUSAN WEYL two kilograms of heroin.

8. On or about August 16, 1972, defendant HERBERT SPERLING met with defendant BEN MALLAH in the vicinity of 844 Seventh Avenue, New York, New York.

9. On or about September 20, 1972, defendants HERBERT SPERLING and NORMAN GOLDSTEIN, a/k/a Sonny Gold, met in the vicinity of 844 Seventh Avenue, New York, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources.

(Title 21, United States Code, Section 848)

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COUNT THREE

The Grand Jury further charges:

In or about the month of May, 1971, in the Southern District of New York, FRANK SERRANO and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-half kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

In or about the month of September, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A);

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COUNT SIX

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., ALBERT PEREZ, a/k/a ABBE PEREZ, EDGARDO RAMIREZ and AL BRACER, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2)

COUNT SEVEN

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT EIGHT

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute

and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT NINE

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York HERBERT SPERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section.)

COUNT TEN

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron, VINCENT PACELLI, JR., HERBERT SPERLING and BEN MALLAH, the defndants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT ELEVEN

The Grand Jury further charges:

On or about the 18th day of October, 1971, [illegible] a/k/a Ramon Lombardero, OCTAVIO del BUSTO [illegible]

GARCIA the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 303.5 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWELVE

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, ALBERT PEREZ, a/k/a Abbe Perez, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A); Title 18, United States Code, Section 2.)

FOREMAN

WHITNEY NORTH SEYMOUR, Jr
United States Attorney

JPL:rs
73-1277

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- :

BENJAMIN MALLAH, :
VINCENT PACELLI, JR., :
ALFRED CATINO, a/k/a "Herbie", :
ALFRED DE FRANCO, a/k/a "Skinny", :
BARNEY BARRETT, :
ISMAEL TORRES, :
PETER SALANARDI, :
COURTLAND SAMPLE, a/k/a "Bucky", :
ALBERT PEREZ, a/k/a Abbe Perez, :
AL BRACER, :
EDGARDO RAMIREZ, :
JACK SPADA, and :
JOHN FAZZALARI, a/k/a "Fuzzy", :

Defendants. :

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INDICTMENT

S 73 Cr. 881

The Grand Jury charges:

1. From on or about the 1st day of January, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, BENJAMIN MALLAH, VINCENT PACELLI, JR., ALFRED CATINO, a/k/a "Herbie", ALFRED DE FRANCO, a/k/a "Skinny", BARNEY BARRETT, ISMAEL TORRES, PETER SALANARDI, COURTLAND SAMPLE, a/k/a "Bucky", ALBERT PEREZ, a/k/a Abbe Perez, AL BRACER, EDGARDO RAMIREZ, JACK SPADA and JOHN FAZZALARDI, a/k/a "Fuzzy", the defendants, and Herbert Sperling, Joseph Conforti, Louis Mileto and Barry Lipsky, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, willfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 341(a)(1) and 341(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about July, 1971 the defendant EDGARDO RAMIREZ delivered two cans of lactose to 1420 Third Avenue New York, New York.

2. In or about November, 1971 co-conspirator Herbert Sperling delivered to defendant VINCENT PACELLI, JR. two kilograms of heroin.

3. In or about September, 1971 the defendant VINCENT PACELLI, JR. delivered approximately two kilograms of heroin to defendants ALFRED CATINO, a/k/a "Herbie" and JOHN FAZZALARI, a/k/a "Fuzzy".

4. In or about the month of December, 1971 the defendant VINCENT PACELLI, JR. delivered one kilogram of cocaine to the defendants ALFRED DE FRANCO, a/k/a "Skinny" and JOHN FAZZALARI, a/k/a "Fuzzy".

5. On or about August 16, 1972 the defendant BENJAMIN MALLAH had a conversation with co-conspirator Herbert Sperling in front of 344 Seventh Avenue, New York, New York.

6. In or about the month of December, 1972 the defendant BARNEY BARRETT was in the vicinity of 344 Seventh Avenue, New York, New York.

7. On or about January 10, 1973 the defendant JACK SPADA had in his possession approximately two and one-half kilograms of heroin.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about the month of September, 1971, in the Southern District of New York, VINCENT PACELLI, JR., ALFRED CATINO, a/k/a "Herbie" and JOHN FAZZALARI, a/k/a "Fuzzy", the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

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COUNT THREE

The Grand Jury further charges:

In or about the month of December, 1971 in the Southern District of New York, VINCENT PACELLI, Jr., ALFRED De FRANCO, a/k/a "Skinny" and JOHN FAZZALARI, a/k/a "Fuzzy" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FOUR

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, VINCENT PACELLI, Jr., ALBERT PEREZ, a/k/a Abbe Perez and EDGARDO RAMIREZ the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FIVE

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, BENJAMIN MALLAH and VINCENT PACELLI, Jr., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SIX

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York, BENJAMIN MALLAH and VINCENT PACELLI, Jr., the defendants, unlawfully, intentionally and knowingly did distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

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COUNT SEVEN

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, BENJAMIN MALLAH and VINCENT PACELLI, Jr., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT EIGHT

The Grand Jury further charges:

On or about the 18th day of November, 1971, in the Southern District of New York, ALBERT PEREZ, a/k/a Abbe Perez, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

FOREMAN

PAUL J. CURRAN
United States Attorney

over all the tapes.

THE COURT: No. All Mr. Arkin did was make a side remark that he didn't see how the privilege could still reasonably be pressed at this point and I said I think you are right, but we will get to that point and see.

MR. GROSS: I believe your Honor's direction was that all the tapes be turned over.

Am I incorrect about that? I'm sorry if I am.

THE COURT: I thought there was only one tape.

MR. GROSS: There are a number of them and the subpoena called for a number of them.

MR. ROSENTHAL: I just wanted to be certain on the record.

THE COURT: All right.

(Recess.)

(In the courtroom, jury absent.)

MR. GROSS: John Gross and Robert Morvillo appearing for the Government.

I believe Mr. Arkin has an application.

MR. ARKIN: I believe Mr. Arkin can inform the Court himself that he has an application.

THE COURT: Yes.

MR. ARKIN: If your Honor please, in the interests of justice, the defendant moves for a mistrial

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subject, of course, to certain conditions which I understand Mr. Morvillo, on behalf of the Government, will spell out for the Court on the record here now.

MR.MORVILLO: Your Honor, Mr. Arkin quite accurately states the Government's position.

The Government consents to a mistrial in this case and there are certain conditions that the Government has agreed to with Mr. Arkin and it would be our position that these conditions should be spelled out on the record so that there is never any misunderstanding with regard to what arrangements have been made here and after they are spelled out on the record, the Government would ask your honor to ask the defendant Pacelli whether or not he consents to the conditions and the mistrial.

MR. ARKIN: Assuming that the conditions are spelled out accurately, I certainly would instruct my client --

THE COURT: He can speak for himself. He will have to.

MR. MORVILLO: Your Honor, the arrangements deal with two cases. The arrangements deal with the case presently on trial. As I understand it, that is Indictment 72 Cr. 1319.

THE COURT: That is correct.

MR. MORVILLO: And also with a case I guess which was also tried before your Honor, and which is now in the Court of Appeals and that is Indictment 72 Cr. 664.

And let me just see if I can clearly spell out this agreement that's been reached with Mr. Arkin.

Basically, there are four portions to this agreement:

The first is that if Indictment 72-Cr. 664 is sustained on appeal, the Government agrees that Indictment 72 Cr. 1319 will not be retried and we will seek permission to file a nolle prosequi on Indictment 72 Cr. 1319 with this Court.

MR. ARKIN: Excuse me. May I interrupt you, Mr. Morvillo?

If it is either sustained on appeal or not otherwise vacated, referring to the 664 indictment.

MR. MORVILLO: What does that mean?

MR. ARKIN: In other words --

(Counsel conferred privately.)

THE COURT: Assume that it is sustained on appeal, or a motion to vacate it is not granted.

MR. ARKIN: Yes, your Honor, that is the point.

THE COURT: Then 1319 will be nolled, is that your understanding?

MR.MORVILLO: 1319 will be nolled, your Honor, if 72 Cr. 664 stands up all the way.

MR. ARKIN: That says it.

THE COURT: All right.

MR. MORVILLO: Now, your Honor, if 72 Cr. 664 is vacated and that case is retried-- suppose there is a reversal or the Government consents to the vacation of the judgment of conviction and the Government decides that that indictment shall be retried-- the agreement is that the Government has the option of including in that retrial 72 Cr. 1319.

In other words, those two indictments would either be consolidated or a superseding indictment encompassing the crimes charged in both of those indictments, would be filed and that case would be tried as one.

THE COURT: Is that the conditions upon which you move for the mistrial?

MR. ARKIN: To make it perfectly clear, the second condition which Mr. Morvillo laid down would be that the present case, 1319, which consists of one count, would be an added count in the 664 indictment.

Is that clear, Mr. Morvillo?

MR. MORVILLO: Yes; either by way of a superseding indictment or a motion to consolidate.

MR. ARKIN: Either way.

MR. MORVILLO: The third portion to this arrangement is that if 72 Cr. 664 is vacated and it is not retried, if the Government decides for whatever reasons it does that it should not be retried, the Government also agrees that 72 Cr. 1319 will not be retried and we will seek permission to file a nolle prosequi with this Court.

MR. ARKIN: With respect to both indictments.

MR.MORVILLO: Right.

Finally, your Honor, if 72 Cr. 664 is retried, either with or without the crime charged in 72 Cr. 1319, and a conviction is obtained with regard to that retrial, the Government will urge this Court that the Court would be bound by the doctrine of Pierce v. North Carolina and that it would control as to sentence and that the Court could not impose a sentence of more than 15 years on the defendant Pacelli to run consecutively to the 20 years which he is already serving.

That would be the Government's position with regard to that and I think that I have now stated all four portions to the agreement which has been reached, your Honor.

MR. ARKIN: That is quite right, your Honor.

THE COURT: Mr. Pacelli.

DEFENDANT PACELLI: Yes, your Honor.

BY THE COURT:

Q You have heard the proposal that's been submitted to this Court, the basis of a mistrial at this stage of the proceedings.

Do you understand it?

A Yes, I do, your Honor.

Q Do you consent to it?

A Yes, I do, your Honor.

Q Have you consulted with Mr. Arkin with respect to what is involved in this?

A Yes, I have.

THE COURT: All right. The application is granted.

The Court grants a mistrial.

Would you bring the jury in?

MR. GROSS: Your Honor, the--

THE COURT: We have the jury to bring in. Let's get the jury first and we can take care of that.

MR. ARKIN: One brief thing, your Honor. The U. S. Attorney has stated to me that they will keep the original tapes within an office safe for any future use which may or may not be made of them.

United States of America

vs 72 Cr 664

Vincent Pacelli, et al.

March 1, 1973

Before:

HON. LEE P. GAGLIARDI,
District Judge

Present:

Mr. Nields
Mrs. Rosner
Mrs. Oberman

- - - -

MRS. ROSNER: Your Honor, Roy Siegel couldn't be here today and he asked me to stand in for him. He is Mr. delBusto's lawyer.

THE COURT: Is Mr. del Busto here?

DEFENDANT DEL BUSTO: Yes.

THE COURT: Come up here, Mr. del Busto.

Do you consent, Mr. del Busto, for Mrs. Rosner to represent you here in place of your regular attorney?

MR. NIELDS: Your Honor, I should put on the record that I had an interpreter for Spanish.

THE COURT: Let's swear the interpreter.

(Aneta Seraphides sworn as interpreter of Spanish.)

THE COURT: NOw, Miss Seraphidess, will you ask

Mr. del Busto if he consents that Mrs. Rosner represent him here in place of his regular attorney.

THE INTERPRETER: Yes, your Honor.

THE COURT: Mr. Garcia.

MR. NIELDS: Your Honor, I am afraid there needs to be a word of explanation on Mr. Garcia.

Contrary to what the marshals told me this morning, they could not bring Mr. Garcia over. Apparently there is a problem. Although he is in West Street, there is apparently a technicality and the government is required to issue a writ in order to bring him here.

I apologize for not having uncovered that before today. However, I believe that does not need to be a stumbling block for the purposes of the proceedings which will occur this afternoon. I believe that Mrs. Oberman will make a motion on his behalf, indicating she has discussed it with him already and the government sees no problem with the making of that motion without Mr. Garcia being present.

THE COURT: All right. What is before me today?

MRS. ROSNER: Your Honor, the government has submitted papers on the affidavit of Mr. Nielgs, suggesting that the conviction here be set aside and a new trial be ordered, pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

I would indicate on behalf of the three defendants whom I represent this afternoon that they would acquiesce in the granting of that motion.

THE COURT: Well, I haven't heard a formal motion, yet.

MR. NIELDS: Your Honor, the government is not making amotion. I just discussed this with Mrs. Rosner a few minutes ago. She indicated she would be making a motion and if she does, I indicated the government would consent to it.

THE COURT: There is no motion before me now -- except you people.

MRS. ROSNER: I'll make it.

THE COURT: What is the motion?

MRS. ROSNER: ON behalf of the defendant Pacelli, Valentine and del Busto, it is their application that the proceeding be set aside and a new trial granted.

THE COURT: Mr. Nields?

MR. NIELDS: The government, for reasons indicated in the affidavit which I filed, consents to that motion and I want to make it perfectly clear the government does intend to retry each of these defendants for the crimes of which they have already been convicted.

THE COURT: All right. Motion is granted.

MRS. ROSNER: Thank you, sir.

THE COURT: Mrs. Oberman?

MRS. OBERMAN: I make the same application on behalf of the defendant Garcia.

MR. NIELDS: I would like to verify from Mrs. Oberman that she has discussed this matter with Mr. Garcia and there will be another trial or at least the government intends to retry Mr. Garcia and that she has discussed the double jeopardy problem with him and he wants to make the new trial motion, knowing that there will be a new trial.

THE COURT: What do you have to say to that?

MRS. OBERMAN: Yes, your Honor. I was assigned by the Court of Appeals to represent Mr. Garcia on the appeal and that when this matter came up, I think, I was brought to West Street and I had extensive discussion with him and he indicated his full acquiesence in this course of proceedings.

THE COURT: What you are doing here now is pursuant to a consultation at his direction and your recommendation?

MRS. OBERMAN: Correct, and I would also like to say that I am representing him today for purposes of this motion only.

I was assigned in the Court of Appeals. I understand that he is at this point attempting to retain an attorney and I just felt that since I was familiar with the

matter, I could be here today.

THE COURT: Well, he has authorized you to represent him here in this matter today?

MRS. OBERMAN: Just for this matter today.

MR. NIELDS: The government consents in that motion, also.

THE COURT: The motion will be granted.

Now, what is the status with respect to bail?

MR. NIELDS: Your Honor, Mr. Pacelli is serving another sentence.

THE COURT: I am aware of that.

MR. NIELDS: So that bail would be academic as to him.

THE COURT: Yes, although that is on appeal, is it not?

MR. NIELDS: It has been affirmed by the Second Circuit, your Honor.

THE COURT: But there is certiorari in the Supreme Court, isn't there?

MRS. ROSNER: There is an application pending. It has not yet been decided.

MR. NIELDS: In any event, he is serving that sentence at this time. At such time as that conviction may be reversed, we don't believe it will be, it seems to me an

application for bail could be made by Mr. Pacelli at that time on this case, but in the meantime, the government suggests that he remain remanded.

THE COURT: Youare not asking for any bail in this case at this time, then?

MR. NIELDS: No. That is right. The government is not askin g for bail.

MRS. ROSNER: With respect to the defendant Valen-ine, during the pendency of this proceeding there has been a State detainer lodged in connection with a different case. That detainer is about to expire within a matter of days.

I have to speak to Mr. Valentine's parole officer in connection with that case but I expect that the State process, which is the one lodged against him, will be satisfied within a very few days.

We would ask your Honor for leave to come before you at that time, when that detainer is lifted, and have bail fixed in connection with this matter.

MR. NIELDS: That is agreeable to the government, if he remains remanded up until that time.

MRS. ROSNER: He can't go anyplace. He has a detainer against him.

THE COURT: You may make your application on short

notice, if you would like, making an appropriate motion but what about Mr. del Busto?

MRS. ROSNER: I am not familiar, your Honor, whether there are any other detainers or other process of other Courts lodged against him. Perhaps the Court would indulge me by letting me look at the Court papers or inspecting the Court papers or Mr. Nields might know.

MR. NIELDS: I am unaware of any detainer with respect to Mr. del Busto, your Honor.

THE COURT: What was the bail set in this case originally?

MR. NIELDS: Well, your Honor, originally Mr. del Busto was released by the Commissioner on $10,000 bail. He became a fugitive shortly thereafter. A bench warrant was issued for his arrest. He was eventually found, arrested and bail of $75,000 was set upon him at that time, pending trial.

The government submits that circumstances have changed somewhat since then. Mr. del Busto has gone through the trial, been convicted, sentenced. He is aware that the government is going to be able to produce substantially the same proof at the next trial. His motive to flee should he he released on bail is enormous and the government suggests that bail be set in the amount of $100,000.

MRS. ROSNER: Your Honor, I would suggest in the very least until Mr. del Busto's counsel has an opportunity to come before your Honor, since he was totally unable to make his original bail of $75,000 and remained incarcerated during the entire trial, that Your Honor at the very least set that amount of bail and then allow his counsel to appear before you with all of the information.

THE COURT: All right. I'll set bail at $75,000; either cash or surety bond in that amount.

MRS. ROSNER: Thank you, Judge.

THE COURT: Mr. Garcia; what is his situation?

MRS. OBERMAN: Your Honor, this is an area that I am not familiar with and the application that I would make is that when counsel is retained by Mr. Garcia, that we have leave to come back in and make the bail application.

I hope that will be some time next week.

THE COURT: All right. You can do it; advise him that when counsel is a-pointed, that he may make an appointmnet with my secretary and we can do it on short notice, if necessary.

MRS. OBERMAN: Thank you very much.

THE COURT: Now, I have another question, Mr. Nields: I think it is the practice in this Court that the same judge no retry the case and I don't know whether this is

going to be prosecuted under the same indictment or another indictment or what.

MR. NIELDS: Your Honor, so far as I know, the government intends to prosecute the same indictment. I also know of instances in which the same judge has retried cases.

THE COURT: Well, let me suggest this to you: I am not going to retry this case.

MR. NIELDS: Very well, your Honor.

THE COURT: I think that is the better practice in this Court and I am going to follow it.

MR. NIELDS: Very well.

THE COURT: We will work out the mechanics of reassignment, whether it goes through the assignment committee or back to Room 110, but for present purposes, retain it here and then it will be reassigned to another judge.

MR. NIELDS: I take it this is an inappropriate time to talk about setting a retrial date.

THE COURT: Yes.

MRS. ROSNER: Your Honor, we would make an application in that regard on the authority of In Re Bryan, which is, I think, the matter you are referring to.

THE COURT: It's called Bryan's rule in this Court.

MRS. ROSNER: We would suggest that this matter be thrown back into the drum for a random selection of a new

judge.

THE COURT: I think Rule 16 provides that I send it back to the assignment committee and the committee assigns it either directly or by lot. I think that is the way it is. Then, whether there are any related cases to this, I don't know. So, there are other ramifications but it will be done in accordance with the rules.

Thank you.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : GOVERNMENT'S AFFIDAVIT

-v-

S 73 Cr. 881

BENJAMIN MALLAH, et al :

Defendants.

:

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STATE OF NEW YORK)
COUNTY OF NEW YORK ; ss.:
SOUTHERN DISTRICT OF NEW YORK)

JAMES P. LAVIN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and am in charge of the prosecution of the above case. This affidavit is submitted in opposition and in response to defendant Vincent Pacelli, Jr.'s motions: for production of Grand Jury minutes and for dismissal of the indictment on the grounds that the Grand Jury was misled, to produce witnesses for interview, for a psychiatric examination of Barry Lipsky, to strike words from the indictment and to dismiss the indictment for violation of Pacelli's Fifth Amendment rights and for lack of evidence before the Grand Jury, to dismiss the indictment on the grounds of former jeopardy, violation of due process and speedy trial and for a severance.

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2. Superceding indictment S 73 Cr. 881 filed on September 20, 1973 charged the defendant Vincent Pacelli Jr. and 12 other defendants with conspiracy to violate the federal narcotics laws during the period January 1, 1971 to October 20, 1973. Counts Two, Three, Four, Five, Six and Seven charge Pacelli and various other defendants with distributing and possessing with the intent to distribute kilogram quantities of heroin and cocaine.

3. This Indictment, S 73 Cr. 881, supercedes indictments 73 Cr. 330 and superceding Indictment 73 Cr. 441. In the latter two indictments Pacelli was charged along with 27 others with conspiracy to violate the Federal narcotics laws. Pacelli and 16 others in Indictment S 73 Cr. 441 went to trial before Judge Milton Pollack on June 14, 1973. On July 8 and 9, 1973 while the trial was in progress the defendant Pacelli and his attorney confirmed to the Court that Pacelli would testify as a witness if his case was severed from the jury (Tr. 3515, 3554).* On July 9, 1973 the defendant Pacelli testified on behalf of various of his co-defendants. Thereafter on his motion (Court's Exhibit 127) he was severed and a mistrial declared as to him (Tr. 3645)..

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* Tr. refers to the transcript of minutes of the trial United States v. Sperling, et al S 73 Cr. 441.

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MOTION FOR PRODUCTION OF GRAND JURY MINUTES AND DISMISSAL OF THE INDICTMENT

4. The Government opposes Pacelli's motion for production of the Grand Jury testimony. Pacelli has failed to offer any valid reason for an inspection of Grand Jury minutes and his contention that the Grand Jury was misled by the prosecution in returning the indictment is absurd. If Lipsky had subsequently refused to testify at trial his Grand Jury testimony could have of course been used against him. Furthermore, as defendant is aware Susan Weil also testified against Pacelli in the Grand Jury providing ample if not overwhelming probable cause for Pacelli's indictment.

MOTION TO PRODUCE WITNESSES FOR INTERVIEW

5. The Government would consent to provide Pacelli's counsel with the names of Susan Weil's and Barry Lipsky's attorneys and he can request an interview with their clients. However, Lipsky's and Weil's attorneys in the past have refused to permit their clients to submit to interviews.

MOTION TO DISMISS INDICTMENT FOR VIOLATION OF FIFTH AMENDMENT RIGHTS AND LACK OF EVIDENCE BEFORE THE GRAND JURY

6. The defendant Pacelli was not given use immunity in the Sperling trial and in any event I prdsented all the new evidence to the Grand Jury which handed down Indictment S 73 Cr. 881 and no evidence whatsoever concerning Pacelli's testimony at the Sperling trial in July was submitted to them. The motion to dismiss for lack of evidence before the Grand Jury is especially frivilous inasmuch as Pacelli's prior counsel, and Pacelli himself, were

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given as 3500 material copies of Lipsky and Weil's Grand Jury testimony. The motions should be denied as should be the motion to strike the words in the indictment regarding the term of the conspiracy.

MOTION FOR PSYCHIATRIC EXAMINATION OF BARRY LIPSKY

7. The Government opposes Pacelli's motion for a psychiatric examination of co-conspirator Barry Lipsky. In January 1973 Lipsky entered a plea of guilty to manslaughter in state court in connection with the killing of Patsy Parks. Prior to entering that plea, Lipsky was examined by a psychiatrist, who found that Lipsky was mentally competent. The Government is prepared to make this report available, as it did in the Sperling trial, to Pacelli's attorney. See Opinion of Judge Charles H. Tenney dated April 18, 1973 in United States v. Pacell, 73 Cr. 105.

MOTION TO DISMISS THE INDICTMENT ON GROUNDS OF DOUBLE JEOPARDY, VIOLATION OF DUE PROCESS AND SPEEDY TRIAL

8. The defendant Pacelli's present motion to dismiss this Indictment on the grounds of double jeopardy, violation of due process and speedy trial are essentially identical with the motions he made prior to the Sperling trial and which were denied by the court. In his affidavit attached to his present motion Pacelli now asserts that he was misled by his attorney and the Government into consenting to a mistrial on indictment 72 Cr. 1319, and further that he did not

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consent to a mistrial in the Sperling case, indictment S 73 Cr. 441.

9. The transcript of the conference before Judge Gagliardi regarding indictment 72 Cr. 1319, (a copy of which is attached to the defendant Pacelli's motion papers) shows quite clearly that Pacelli and his attorney consented to the mistrial and that the Government made no promises regarding charging Pacelli in a superseding indictment. The record in the Sperling trial also shows that Pacelli stated under oath that he would testify if he was given a severance and, that after he so testified, his attorney requested a severance and a mistrial which was granted on the consent of the Government. (Tr. 1315-16; 3552-53; 3645; Court's Ex. 127).

10. The present indictment S 73 Cr. 881 supersedes 73 Cr. 330 and S 73 Cr. 441 and the latter two indictments will be nolled. Since Pacelli's trial on S 73 Cr. 441 ended at his own request, in a mistrial his retrial on S 73 Cr. 881 does not constitute double jeopardy.

11. Pacelli's only claim of double jeopardy rests on 71 Cr. 614 and S 73 Cr. 881 and since 73 Cr. 881 alleges the the same offenses as to Pacelli as did indictment 73 Cr. 441 the Government would rely on its memorandum of law submitted in opposition to Pacelli's double jeopardy motion addressed to indictment 73 Cr. 441. A copy of that memorandum is attached hereto.

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12. Pacelli's argument that his due process rights are being violated by trying him on this indictment is without merit. For one reason or another Pacelli has never gone to trial on the charges encompassed in this indictment. Twice he has requested and obtained mistrials on earlier indictments (72 Cr. 1319 and 73 Cr. 441), and one occasion his conviction was vacated (72 Cr. 664). To now argue that the Government's prosecution of Pacelli violated his rights to a speedy trial and the Due Process Clause is absurd. The motions should be denied in all respects.

MOTION FOR SEVERANCE

13. Pacelli has shown no grounds whatsoever in his motion for severance. He states that the certain co-defendants would wish to cross-examine Barry Lipsky regarding Lipsky's manslaughter conviction of Patsy Parks and would be unable to do so since Pacelli participated in the murder and that fact might be revealed on cross-examination. There is no merit whatsoever in that argument. Lipsky testified in the Sperling trial and was extensively cross-examined even by Pacelli's attorney, regarding the murder indictment and subsequent Manslaughter conviction in Nassau County. (Tr. 1154-58; 1217-1227). No mention was made of Pacelli's name, nor of the victim. There was then as there would be in the present trial no possible way the jury could connect Pacelli with Lipsky's manslaughter conviction. This of course assumes that the cross-examination is conducted properly and only the name of the crime, the time and place of

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conviction and the punishment is inquired about. McCormick, Evidence, 88 (2nd Ed. 1972), If this rule is followed, as it should be, no prejudice will result.

WHEREFORE, the defendant Pacelli's motions except as consented to should be denied in all respects.

JAMES P. LAVIN

Sworn to before me this
day of November 1973.

FBV:al

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

-v- : 73 Cr. 441

HERBERT SPERLING, et al., :

Defendant. :

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MEMORANDUM OF LAW

This memorandum of law is submitted in opposition to the defendant Vincent Pacelli, Jr.'s motion for dismissal of the conspiracy count of Indictment 73 Cr. 441 on the ground of double jeopardy.

On June 14, 1971, Indictment 71 Cr. 614 was filed charging Vincent Pacelli, Jr., Demetrios Papadakos, Beverly Jalaba and Elias Poscas with conspiracy and substantial violations of the narcotics laws. On May 22, 1972, Pacelli and Papadakos were convicted after a jury trial.

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The conspiracy count of 71 Cr. 614 alleges that the conspiracy began on January 1, 1971 and concluded on June 14, 1971. Three of the four substantive counts charged the defendants with possession and distribution of various amounts of cocaine on May 3rd, May 10-20 and May 21st all in 1971.

The present Indictment 73 Cr. 441 charges Pacelli and 27 others with conspiracy and substantive violation of the narcotics laws. This indictment alleges that the conspiracy began on January 1, 1971 and concluded on April 14, 1973 when the indictment was filed. Pacelli is the only defendant common to both indictments.

Pacelli contends that since he was convicted under Indictmen 71 Cr. 614 for a narcotics conspiracy covering the period January 1, 1971 to June 14, 1971 he is being subjected to double jeopardy by being charged in Indictmen 73 Cr. 441 with participation in a conspiracy existing from January 1, 1971 to April 14, 1973. The argument is without merit.*

* It should be noted that since all charges included in Indictments 72 Cr.664 and 72 Cr.1319 have been consolidated into the instant Indictment 73 Cr.441, they have no bearing on defendant Pacelli's double jeopardy motion. Pacelli expressly consented to re-trial of these cases following the mistrial in Indictment 73 Cr.1319 (Tr.156-161). Even without consent, re-trial of mistrials is not double jeopardy. U.S. v. Castellanos, —F2d— (2d Cir.1973) Docket No. 72-2337.

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DEFENDANT PACELLI'S CLAIM OF
DOUBLE JEOPARDY IS COMPLETELY
WITHOUT MERIT AND SHOULD BE DENIED

Vincent Pacelli's conviction, entered on May 22, 1972, for violation of Title 21, United States Code, Sections 812, and 841 was based on facts separate and distinct from the evidence to be presented in the present case. That conviction was based on evidence which established that prior to the time of his arrest on May 21, 1971 Pacelli was in partnership with Jimmy Pappas to supply and distribute heroin to customers from Chicago and Detroit. The evidence further established that Pacelli had supplied heroin to Elisa Possas, that Pacelli was trying to break into the cocaine business, and that Pacelli had attempted to dispose of a bag of cocaine at the time of his arrest.

The evidence in the present case, to be introduced primarily through the testimony of Barry Lipsky, will show that on or about April, 1971, Pacelli entered into a new and separate partnership with Al Bracer and Albert Perez to distribute heroin and cocaine. The only common defendant in this conspiracy and the conspiracy for which Pacelli has already been convicted is Pacelli himself. The evidence to

be presented is the product of an entirely separate investigation and will be introduced by witnesses who did not testify in the prior case. The specific events are also distinguishable as illustrated by the over acts and substantive counts.

It is not enough to establish double jeopardy to show that the offenses charged arose out of the same general course of criminal conduct. The offenses are the " 'same' only when 'the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other'." United States v. Kramer, 289 F. 2d 909, 913 (2d Cir. 1961). The offenses for the purpose of double jeopardy must be the same in law and in fact. Dryden v. United States, 403 F. 2d 1008, 1009 (5th Cir. 1968).

In United States v. Pacelli, 470 F. 2d 67, 72 (2d Cir. 1972), the Second Circuit rejected a similar argument of double jeopardy of the defendant, Demetrios Papadakos. It emphasized that, although there was an identity of offenses and an overlap in time, the appellant was the only common conspirator, that the overt acts

FBV:al

charged in each indictment were entirely different and that there was nothing to indicate any connection between the parties or agreements charged in the separate indictments. Similarly, in the present case Pacelli is the only common conspirator, there having been no mention of Al Bracer or Albert Perez or Herbert Sperling, or the other conspirators in this case, in the earlier case. The overt acts alleged in the present case are entirely different from those for which Pacelli has already been convicted and there is no evidence to indicate any connection between the parties or agreements charged in the separate indictments.

CONCLUSION

The motion should be denied.

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

FRANKLIN B. VELIE
Assistant United States Attorney

Of Counsel.

MP

UNITED STATES OF AMERICA

vs 73 Crim 881

PACELLI et al.,

Defendants

New York, N. Y.

November 30, 1973 - 11:00 a.m.

Before

HON. MILTON POLLACK,

District Judge.

Present:

Mr. Lavin

Mr. Duke

- - -

THE COURT: . . . As to the motion to dismiss the indictment for violation of Fifth Amendment rights, in which Mr. Pacelli -- or, rather, his attorney -- states that the defendant testified under a grant of use immunity or, alternatively, under justifiable belief that he was testifying with use immunity in the case 73 Criminal 441, there is neither factual nor legal merit to that suggestion. The defendant did not receive use immunity, nor were there predicates therefor established.

MP 2

Under 21 USC Section 884, the defendant was not and could not have been under any misapprehension. He was present in court. He was very much alive to everything that was going on, participated actively, consulted with and was represented by an able and highly experienced lawyer and voluntarily testified in aid of his relatives and certain others.

The motion to dismiss the indictment on the grounds suggested is totally lacking in fact and merit, and that motion is denied.

As to the motion for the production of the pre-sentence report --

MR. DUKE: Your Honor, may I suggest something before you rule on that? If I may, I would like to amend the grounds for that motion for the production of the pre-sentence report. I would like to request it, not only on the grounds stated in the motion but, in addition, I believe it would support the motion to dismiss the indictment for former jeopardy violation, due process and speedy trial, on the ground it may show that the evidence supporting the allegations of the present indictment was available to the prosecution in 1971, or, rather, early 1972, that is, at the time of the pre-sentence report.

If the pre-sentence report were to have in it what

MP 3

the defendant believes it has in it, it would tend to support the motion to dismiss as well as the motion to recuse.

THE COURT: Mr. Duke, I think it would be a mischievous document to import into the conduct of trials. The perambulations and hypotheses and suggestions and reports of probation officers, which necessarily are hearsay at best and largely designed to give a judge an over-view of a man's character rather than of his acts of misconduct -- to extrapolate from the general content and nature of a probation report anything which would rise to the dignity of matter affecting the prosecution would be rather anomalous, to say the least.

At all events, the motion for disclosure of the pre-sentence report of the defendant Pacelli, obtained in the course of the sentence proceeding in another prosecution, is denied.

As to the motion entitled "Motion for Production of the Grand Jury Minutes", in which the defendant seeks inspection of the grand jury minutes in this case or, alternatively, that the Court order an in camera inspection and make the minutes a part of this record, ostensibly for the purpose of striking surplusage from the indictment, dismissing it for lack of evidence before the grand jury, dismissing it for violation of Fifth Amendment rights -- parenthetically, I don't

MP 4

see how Mr. Pacelli's Fifth Amendment rights could be prejudiced if he didn't testify before the grand jury -- for suppression of evidence purposes and for the catch-all grounds of former jeopardy, violation of due process and the right to a speedy trial, all allegedly bottomed on Dennis and Ramierz, that motion to inspect the grand jury minutes in advance of the trial is denied.

MR. DUKE: May I respond to the parenthetical remark?

THE COURT: Certainly.

MR. DUKE: The motion to dismiss for violation of Fifth Amendment rights is the motion predicated on the defendant's testifying in 73 Crim 441 under either a grant of immunity or reasonable belief that he had immunity, and the argument is that if either of those was the case, then he had the effect of immunity, and on that point I would cite Ellis against United States, 416 Fed. 2nd 791, D. C. Circuit 1969, and if that is the case, then under the decision which I cited in the motion, no United States Attorney who was aware of that testimony could have presented the evidence to the grand jury, and it is in terms of the sanction that the grand jury minutes would be relevant, and since your Honor has ruled that there was no violation, no testimony given with any expectation of immunity, then obviously no sanction

MP 5

is necessary, but that was the purpose of requesting the in camera production of the grand jury minutes.

THE COURT: Well, having presided at the trial and knowing exactly what occurred, it is beyond all reasonable doubt whatsoever, not even a scintilla of doubt, as to the circumstances under which Mr. Pacelli testified and what occurred at the trial, which fortunately, I understand, is properly recorded in the minutes.

He did not request, there was no predicate for, he did not receive, he did not believe, and he has no basis whatsoever for claiming that he thought he was immunizing himself in any aspect by the testimony that he was prepared to and did give to exculpate his aunt, his uncle and a couple of others at the trial.

So if that is the ground, that ground does not even arise.

Now, with respect to the paper entitled "Motion to Strike", which seeks to strike words from Paragraph 1 of the indictment, no more need be said than that the motion to strike words from the indictment is denied.

The item which is entitled "Motion to Dismiss for Lack of Evidence" is predicated on the ground that there was no evidence before the grand jury of a conspiracy between Vincent Pacelli, Jr. and the persons named to engage in the

criminal acts during the period of the indictment, and as support therefor defendant cites his confinement in jail and Harry Lipsky's confinement in jail and the degree of defendant's awareness of what evidence was or was not presented to the grand jury, and on that basis the application is made, and the ruling as to the motion to dismiss Count 1 of the indictment is that the motion is denied. See United States against Castolli, 350 United States 359.

In the item entitled "Motion for Assignment to a Different Judge and Certificate of Good Faith", little more need be said than that this repeats prior displeasure with the court, and no more need be said than that in this jury case the motion to disqualify this Court and to reassign the case to some other judge is in all respects denied.

In the item entitled "Motion for a Severance", in which Mr. Pacelli moves the Court for a separate trial from all other defendants --

MR. DUKE: May I be heard briefly on that, your Honor?

THE COURT: Yes.

MR. DUKE: Since filing this motion, I have obtained copies of a similar motion filed on behalf of defendant Catino, and the affidavits, in which Cantino indicates that he does intend to cross-examine Lipsky concerning the murder in

MP 7

Long Island, and I would simply incorporate, if I may, the memorandum of law and the defendant Catino's motion as giving some factual support for the motion and the allegations concerning Paragraph 3 of the motion for severance.

THE COURT: I have before me the motion of Nancy Rosner in the Catino application, in which she makes reference to the fact that she has been in consultation with you, Mr. Pacelli's counsel, on this subject, and suffice it to say that the motion on behalf of Catino will be today denied with the memorandum that it is not a ground for severance that the defendant seeking the same intends to create prejudice to himself by his conduct of the trial.

Moreover, there are no valid grounds here for a severance, and the motion is denied.

MR. DUKE: Your Honor indicated that the defendant Catino's motion was being denied. I am referring to Pacelli --

THE COURT: I am referring to Catino, because you referred to Catino. I am not going to take up the Pacelli matter.

MR. DUKE: The man behind us apparently represents Catino.

THE COURT: I assume you invoked Catino because you thought it gave some force to the motion of Pacelli for a

severance, and I have parenthetically informed you as to the disposition of the Catino matter.

So far as Pacelli is concerned, there is no valid ground on the basis set forth or any other basis presently before the Court which would warrant a severance, and the Pacelli motion for a severance is in all respects denied.

With respect to the motion to produce grand jury minutes and to dismiss, so entitled, which is made pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, for permission to inspect the grand jury minutes or, alternatively, that the Court inspect the same in camera as a predicate for further motion on the ground that the grand jurors were grossly misled and deceived by the United States in its presentation of the testimony of Barry Glenn Lipsky, a careful review of the allegations and grounds set forth in those papers requires that the motions to produce the grand jury minutes and to dismiss the indictment be denied under Costello against United States, 350 U. S. 359.

There is a paper entitled "Notice of Motion", which apparently was attached to all the other papers, which merely requests that the previous motions or all the motions heard today be calendared, and that motion of course is granted, because you are here, and I am listening and deciding, so that is really unnecessary.

MP 9

Now, I believe the final motion which has been presented here is entitled "Motion to Dismiss the Indictment for Former Jeopardy, Violation of Due Process and Speedy Trial".

There is no basis in any of the papers presented to suggest that Mr. Pacelli is not getting a speedy trial. In fact, if my memory serves me correctly, he thought it was too speedy.

MR. DUKE: Your Honor, that is not the idea behind the use of that phrase. The idea, which is supported by the allegations in the motion, is that the Government -- and, incidentally, I would like to --

THE COURT: You don't mean speedy trial. You mean speedy prosecution.

MR. DUKE: Yes. Speedy prosecution.

THE COURT: All right. I will deal with it on what I think you meant rather than on the words you used.

Speedy trial would have to do with the length of time that phe matter is brought to trial after the indictment is filed. What you are talking about --

MR. DUKE: That is certainly not the claim, your Honor.

THE COURT: I have reviewed it on the larger grounds of considering the timetable of the acts which form

MP 10

the basis of the prosecution and the problems of former jeopardy suggested in these motion papers.

I find no valid basis for the suggestion that the prosecution was in any way unduly delayed or delayed to the prejudice of the defendant Pacelli, and so far as former jeopardy is concerned, that is a claim that lacks legal merit. It does not apply.

I will endorse the papers accordingly.

MR. DUKE: Your Honor, if I could make one minor point: there is a fundamental fairness doctrine under the due process laws which I attempted to make in this motion, and in support of which I cite numerous authorities, including the American Law Institute, the A.B.A. Standards, and the idea there is one of ordinary notions of compulsory joinder.

The argument is that in the absence of the most extraordinary circumstances and absent some showing by the prosecution they are required by fundamental fairness to bring all charges against the defendant in one indictment as to which they have evidence, and there is no suggestion in the Government's responding affidavit, no issue is taken with respect to the allegations in this motion to the effect that the evidence against this defendant has been accessible to and in the possession of the Government for close to two

MP 11

years.

THE COURT: Are you suggesting that the Government would be precluded from having two separate indictments for separate offenses, offenses where the proof as to the first would not suffice for the proof of the second, and the proof of the second would not suffice for the proof of the first?

MR. DUKE: Your Honor, if they brought two separate indictments, the defendant would have an opportunity to move for joinder, and if those offenses were related, the proof was similar --

THE COURT: What happens if the Government comes upon information during the course of the development of the case which requires a second indictment? Does that mean that the Government is at fault?

MR. DUKE: No, your Honor. To the extent that they come upon information subsequent to the first indictment, that warrants a second indictment, obviously they are entitled to bring that indictment. But the defendant's position is that that is not this case. They have been indicting this defendant for almost two years, and they have had Barry Lipsky for almost two years, and they have had the information on which the present indictment is based for almost three years, and that is fundamentally unfair, and if it is a

MP 12

violation of double jeopardy, which I think it plainly is, it is a violation of the elementary rules regarding compulsory joinder.

THE COURT: Well, I am not sure that there is such a rule or that it is elementary, and, at all events, there is no demonstrable prejudice to this defendant in the circumstances.

The allegations that he makes in these papers that the mistrial which was declared as to him as the request of his retained counsel, Joseph Polero, in open court and in the presence of the defendant was not authorized by him, I regard, as most conservatively put, plainly improper.

MR. DUKE: Your Honor, I don't think that is the thrust of the allegation in the affidavit.

THE COURT: That is what it says.

MR. DUKE: He did not consent to a mistrial. His consent in advance of the motion made by the defendant was not made and is not on the record, and I don't see how you can say it is improper. It is here. It is undenied --

THE COURT: I use the word "improper", and if you press me I will say "contrived", that is the sense in which I say it was improper.

I think that deals with all of the matters that you presented to me, Mr. Duke. I will be glad to afford you any

MP 13

further time on any other matters that you think I should consider.

MR. DUKE: Your Honor, I would like, if I may, leave to file another motion to strike portions of the indictment on the ground that various of the defendants named in the indictment are not going to be actual participating defendants, and therefore --

THE COURT: I don't know what you gain by that. Are you concerned that at some stage the indictment will be read to the jury and have names of persons who aren't there?

MR. DUKE: Yes, sir.

THE COURT: Well, to the extent that such named persons are co-conspirators, I can't do much about it, can I?

MR. DUKE: If they are named as --

THE COURT: And also, my practice, if you have read the previous record, is not particularly to read indictments at length to the jury or to present them in haec verba to the jury.

Should the occasion arise where I think it appropriate in the trial of this case to actually read from the indictment, I will give you an opportunity at that time to suggest how I should prune it in reading it to the jury, but to try and repolish the prose by excisions I think would be somewhat inappropriate in advance of the trial and in advance

MP 14

of any use of the indictment for purposes of jury consumption.

MR. DUKE: Well, your Honor, it seems to me that even permitting a paraphrase of some of the allegations in this indictment would be grossly improper.

THE COURT: Such as what?

MR. DUKE: Such as in Count 11, which refers to the defendant Albert Perez and his distribution of narcotics.

My understanding, based upon conversation with Mr. Lavin this morning, is that he is not a defendant in this case.

THE COURT: Then Count 11 will not be called to the jury's attention. That is the simple way out of that.

MR. DUKE: Certainly, it is this problem of prejudice to the jury that I am concerned about.

THE COURT: Well, I think, if my memory serves me correctly -- and Mr. Lavin might refresh it -- I think that the last time that I charged on a similar indictment there was a charge involving Perez, and I think that I even went so far as to say there were only a number of indictments less the one -- number of counts less the one which would have included Perez, and I made no mention of Perez at all.

MR. LAVIN: That's correct, your Honor.

THE COURT: Wasn't that what was done?

MR. LAVIN: Yes.

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THE COURT: You may have confirmed that yourself by reading my charge.

MR. DUKE: I didn't get that far in preparation for these motions.

The only other thing I have in mind, your Honor -- well, two things: I assume there is no problem about my client appearing in civilian clothes. Do I have to make any motion to that effect?

THE COURT: No. I think that is the way he appeared the last time.

MR. LAVIN: That's correct.

MR. DUKE: I heard otherwise. By his own choice he appeared in fatigues, I was told.

THE COURT: That was civilian, too.

MR. DUKE: Well, the clothing that they gave him down in West Street.

The only other thing I have in mind, your Honor, is if it would be appropriate to inquire if your Honor has a view at the present time or a policy with respect to the recess of the case if it should go into Christmas, Christmas falling on a Tuesday, simply in terms of planning my own vacation schedule.

THE COURT: I have no policy, because I have never tried one on Christmas, and so far as a view is concerned,

whatever does develop in that period of time, I would hope that we would give everybody the opportunity to celebrate to the extent of his own desires -- his or her own desires -- jurors, too -- the religious holiday involved.

I would not press for trial on Christmas Day unless circumstances were extraordinary.

Now, the more difficult question you pose is: suppose the jury goes out on December 24th in the morning and has not come back on the night before Christmas. Then what do we do? That is one I will discuss with you if we ever get t-that point.

MR. DUKE: Well, I think you implicitly answered another aspect of the question and that is how your Honor might regard a request either by the jury or the attorneys or by the defendants to recess on the 24th or, say, at noon on the 24th or to skip the 24th on the ground that it is a Monday.

THE COURT: All I can say to you is that I grew up in a reasonably religious family, and I believe in the tenets, although Christmas day doesn't seem to be my holiday.

Now, I think that completes the matters for Mr. Pacelli, and I think this gentleman who came in wants to talk about U. S. A. against Catino.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-versus- 73 Crim. 881

VINCENT PACELLI, JR.,

Defendant.

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New York, N.Y.
March 15, 1974
2:00 p.m.

Before:

Hon. Milton Pollack,

District Judge.

APPEARANCES:

PAUL J. CURRAN, Esq.
United States Attorney for the
Southern District of New York
By: JAMES LAVIN, Esq.,
Assistant United States Attorney

STEVEN DUKE, Esq.
Attorney for Defendant

THE CLERK: For sentence, Vincent Pacelli, Jr.

THE COURT: Mr. Duke, I will hear you on the motions. I have read the papers and you can assume I have some familiarity with the points.

MR. DUKE: Is your Honor referring to the two motions I filed yesterday?

THE COURT: Yes.

MR. DUKE: With respect to the motion for supplementing the record, your Honor, as I indicated in my memorandum in motions prior to trial, there is substantial basis for the defendant's belief that the Barry Lipsky information was before your Honor at the time at least in some form, was before your Honor at the time defendant was previously sentenced. I am not suggesting that there is anything the least bit improper about that, it is perfectly proper.

In expectation of a possibility that we may wish to seek appellate review of the sentence, it seems to me that the information that was available to your Honor both at that time and this time is relevant and I call your Honor's attention to Section 57 of the American Bar Association standards for sentencing alternatives and procedures, which recommends that the record include all the materials, all documents available to the sentencing Court as an aid in passing sentence.

I already in pretrial asked for the presentence report in 614 and at this time I urge that whatever written materials were before your Honor at the time of sentencing in 614 and at the time of this present sentence be sealed so that the appellate court may review them in the event an issue should be raised about the sentencing.

THE COURT: What about this request for findings? What is the authority for that?

MR. DUKE: The leading case authority is North Carolina against Pearce which concededly dealt with the narrow issue but indicated that where there is ground for the defendant or public to suspect that he is being sentenced vindictively that the Court indicate. That would be true in any case where he receives a sentence in excess of the sentence he received on the previous occasion and that findings should be made on the record of the reasons for those enhanced sentences.

THE COURT: There is disagreement between you and Mr. Lavin as to whether the two cases are the same. The authority you cite of course, is elementary knowledge to judges around here, I think. The question is whether your facts fit within the situation or don't.

What do you say as to his opposing affidavit?

MR. DUKE: In the first place, the charges in the

indictment upon which the defendant was acquitted are irrelevant. We look only at the charges on which the defendant was convicted. He was convicted of conspiracy from May 1st, 1971. This conspiracy, while it is true named a lot of individuals that were not named in the conspiracy in 664, it is clear that it is the same conspiracy, the co-defendants in 664, Mr. Del Busto, Mr. Garcia, Mr. Ballantine were charged in the Sperling case with substantially the same conspiracy that the defendant is charged with in this case.

THE COURT: You mean they were both charged with narcotic conspiracies, is that the point? Both of them were narcotics cases?

MR. DUKE: They were narcotics cases.

THE COURT: Were the overt acts relied upon by the government the same?

MR. DUKE: I believe they were at least --

THE COURT: Were the substantive offenses the same?

MR. DUKE: I believe with respect to those defendants the only substantive offense charged in 614 was Count 11 which was identical to Count 3 in 664. So to that extent, the substantive charges were the same.

The major consideration is that the evidence in

this case, the evidence in 664, is substantially identical with the defendants, namely the testimony of Barry Lipsky and notwithstanding the fact that the defendants Garcia and Del Busto and Ballantine were convicted of a conspiracy, that at least in terms of the parties named it appears or could have been a different conspiracy, they were sentenced -- at least Garcia particularly was sentenced -- with the understanding that it was the same conspiracy.

As far as I know the proof was very similar. In this case the proof was very similar to the proof in both 664 and 1319. The differences come down to this, with respect to the substantive counts:

In 664 the defendant Pacelli was charged with a substantive count with Ballantine, Lipsky on September 28, 1971. That is the Yellowfingers transaction.

In 1319 he was charged in a substantive count with Lipsky, Lugo and himself some time in October of 1971. In this case he was convicted of a substantive count in September of 1971 and a substantive count in November of 1971.

So that the time frame, the difference in the time frame is miniscule. It is true that the testimony relied upon in support of the substantive counts in those other cases are different than this case. However, the evidence of the substantive count that the government offered

charged in the present indictment was well known to the government at least a year prior to the bringing of the charges. Indeed, a year prior to some period prior to Mr. Pacelli being indicted in 664 and 1319.

It appears that the government elected to drop the 664 substantive count and substitute Count 2 in the present indictment because the Count 2 evidence was stronger in that Lipsky could not be refuted as he could on the substantive count in 664.

By that I mean that if they had charged Mr.Pacelli with the Yellowfingers transaction which was involved in 664 as the evidence in this case indicates, Mr. Pacelli in all likelihood would have been acquitted because the officers that observed that surveillance contradicted Lipsky and it seems, therefore, on the surface, that all the government has done is selected one of an unlimited number of instances that Mr. Lipsky told the government about back in March, April and May of 1972, stuck them in this indictment, dropped out the Yellowfingers transaction because it felt it had a strong case.

We obviously claim they can't do that under Pearce and under the argument that we made before trial, which are not directly related to the question of sentence.

Assuming they charge, after a defendant has gone

through two trials and after they have obtained his consent to a mistrial in one case and his consent to vacating conviction in another case on the representation that if either or both of those cases would be retried he could not be sentenced to more than 15 years and they continued to indicate to him as late as March 1st, 1973, which was the date the government finally got the complete benefits of the agreement with Mr. Pacelli, that is the date that Mr. Pacelli moved to set aside the conviction in 664, it was only after that that they decided to add these new charges notwithstanding the fact that they had all this evidence over a year and didn't breathe a word of it.

So it seems to me that under the two cases that I cite, even if there had been no express agreement with respect to sentencing, this is a case where the government has added charges subsequent to the mistrial and the vacation of the conviction, without a semblance of justification other than the fact that, I assume, they thought they had a stronger case.

THE COURT: Don't you think that is sufficient justification?

MR. DUKE: No, I certainly don't. I think it is not sufficient justification at all unless they can show that for some reason some new evidence developed, something

happened, subsequent to the setting aside of the conviction that would justify that. In this case nothing happened.

It seems to me the essence of Pearce is that you can't substitute two charges after you have gone through a trial which has been upset, substitute new charges because they think they are a little stronger after having had a dry run on weaker charges or charges that appeared to be weaker, because the evidence is now known to the defendant and he has an opportunity upon retrial to more effectively contest them.

It seems to me the essence of Pearce you can't, without a clear showing and justification, a justification which would preclude or which would exclude a mere desire to obtain a procedural advantage and which would certainly exclude any possible vindictiveness on the part of the prosecution, in the absence of that I don't believe they can change the charges.

But even if we can accept arguendo that they can do it, that leaves the question of sentence. It is one thing to obtain all the advantages as the government did here, of getting the mistrial, consent to a mistrial, consent to the vacation of conviction on 664, take all the advantages and throw in some new charges that were known to the government a year before, and it is quite another thing to say that the

man can receive a higher sentence on the retrial of the new charges which were known long before the prior trials. And I think with respect to what the Court of Appeals said, I think that it is relevant here, the Court of Appeals said that the prosecution can't, for no valid reason, charge the defendant when the first conviction was set aside, with more serious offenses based upon the same conduct. The key word is "conduct."

But given the fact that the conduct involved in the prior cases was conduct from April of 1971 to February of 1972, that is conspiratorial conduct, it is the same in this case, the substantive offenses, the conduct there in those two prior cases was in September and October and here it is in September and November.

The course of conduct of the possessing and distributing narcotics during that narrow three month time frame I submit, is the same conduct -- not necessarily a double jeopardy issue which is a separate issue -- but in terms of enhancing the punishment after the defendant obtained a vacation of conviction or for a mistrial.

THE COURT: What do you conceive to be the maximum available term apart from the argument that you make on Pearce?

MR. DUKE: Apart from the Pearce argument there

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is the agreement argument which --

THE COURT: That is the same argument. That is one and the same.

MR. DUKE: Apart from Pearce and the agreement, the maximum available term is that term which would appear to be rational, based upon findings indicating that and having some support in the record, indicating that the defendant has committed misconduct since the last sentencing and on information not known to the Court at the time of the previous sentencing in 614 and is now known to the Court.

And based upon this information or that subsequent misconduct, some reasonable sentence would be appropriate up to presumably 45 years. Again, apart from any double jeopardy and all the arguments I made pretrial, assuming otherwise a valid sentence, it seems to me that I kind of indicate what I think are the general limitations.

THE COURT: Anything you want to say, Mr. Lavin? Have you completed?

MR. DUKE: I would like to say something in general about the sentence.

THE COURT: We will come to that.

MR. DUKE: I finished my argument on these legal matters.

MR. LAVIN: Just to add that in both those earlier

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indictments, the 664 and the 1319, all the other defendants in those cases were arrested right after the acts complained about.

They were arrested, one in October of 1971 and November and January of 1971, well before the government had Mr. Lipsky in custody.

THE COURT: You say November and December 1971? Did you mean 1972?

MR. LAVIN: No, your Honor, 1971.

THE COURT: Everybody was arrested in 1971?

MR. LAVIN: Ballantine, that i he 664 indictment which had been on appeal at the time of the mistrial, the substantive counts took place on the 28th of September. Those defendants were arrested on or about that day.

The 1319 events took place in October of 1971 and November of 1971 and I believe the last person in that charge aside from Mr. Pacelli had been arrested in early 1972.

THE COURT: As I remember the earliest case tried, I think that was 664, wasn't it?

MR. LAVIN: That is right, your Honor.

THE COURT: Is that the one I tried, 664?

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MR. DUKE: 614.

THE COURT: 614 is what I am talking about. 614 had something to do with May of 1970, didn't it?

MR. DUKE: 1971, your Honor.

THE COURT: May of 1971. That was confined to the period in May 1971, am I correct in my recollection about that?

MR. LAVIN: Yes.

THE COURT: Weren't all the overt acts and the substantive charges all related to a time, the first couple of weeks in May 1971?

MR. LAVIN: I believe they were.

THE COURT: It didn't go into the fall of that year at all. They were confined in that particular short span if I remember correctly.

MR. LAVIN: Yes, your Honor.

THE COURT: Possibly into June. I'm not sure. All right.

What about this request for a copy of the probation report? Do you know of any authority for that?

MR. LAVIN: No, I don't.

THE COURT: What about the request for special findings, do you know of any authority for that?

MR. LAVIN: I haven't heard about any.

THE COURT: It is perfectly clear and I think Mr. Duke is correct that you did not notify or file a charge against Mr. Pacelli as a second offender in this case.

MR. LAVIN: That is correct, your Honor.

THE COURT: So he is being sentenced as a first offender on these charges.

MR. LAVIN: In the sense that he has not been sentenced as a second offender on this statute which provides him with double punishment, yes, your Honor.

THE COURT: You can't double up the punishment because of a charge of a second offender.

MR. LAVIN: That is correct.

THE COURT: That was not clear to my at the last round of this proceeding.

All right, Mr. Duke, I will hear you now. Is there anything you want to say on the subject of sentence itself?

MR. DUKE: Yes, your Honor. I won't repeat what I said the last time, but with respect to the question of the second offender statute, there are two questions, it seems to me.

We are all agreed that the enhancement of the statutory maximum is not available because no second offender notice has been filed and I take it there is no issue about going beyond the statutory maximum.

But it seems to me, nonetheless, it would be appropriate for the Court in determining an appropriate

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sentence within -- I will rephrase it.

The Court might believe that it is appropriate to consider within the range of the ordinary statutory maximum whether the defendant appears to be a rescidivist; whether in fact he was a second offender; whether in fact he committed this offense subsequent to his prior conviction.

It is on that that I am fearful that there may be some misapprehension.

THE COURT: The dates don't carry into that question at all. If my memory is correct in 614 it had to do with May of 1971 and the present case on which sentence is to be passed had to do with September to December 1972. Then it can't be said that he stands before the Court having been convicted of an offense prior to the trial of this case or am I wrong about that?

MR. DUKE: That is correct, he was not convicted-- the offenses for which he now stands convicted in this case preceded his prior conviction. That is the only point I want to make sure there is no misunderstanding about.

THE COURT: I think you stated it more exactly than I did but that is what I intended to say. I think I agree with you. I read your papers and that part I agree with. That comes right from the statute itself, reading Title 21, Section 841 subdivision (b)(1)(A).

"If any person commits such a violation after one or more prior convictions of him" -- now, the conviction on 614 was May 22, 1972. The violations charged here were earlier and not after that prior conviction.

MR. DUKE: That is correct.

THE COURT: I agree with that point.

MR. DUKE: I would just add, your Honor, that I did mention this before but I want to mention it again for underscoring, there is no evidence known to me, assuming the truth of everything that I have heard on this witness stand and I have read the transcripts in 614 and all these other transcripts and this 3500, there is nothing to support the probation officer's opinion that Mr. Pacelli is a long-time narcotics trafficker in the ordinary meaning of those words.

That is a factual issue I very seriously contest but the evidence --

THE COURT: I don't know any more about it than what I heard in the two trials and that testimony related, as I already indicated, to two separate periods involving separate personnel. One in the period of the spring of 1971 and the other in the fall of 1971.

MR. DUKE: That is true, your Honor, but --

THE COURT: But that is enough.

MR. DUKE: Mr. Lipsky testified that he and

Mr. Pacelli were engaged in these activities from April of 1971 to February of 1972, which includes the May period about which the prior case was involved.

THE COURT: The charge in 614 specifically excluded April, didn't it?

MR. DUKE: Except for the conspiracy count, I believe the conspiracy count --

THE COURT: Particularly in the conspiracy count it excluded it for the very simple reason and that was to avoid getting involved in the old law which became effective in May.

MR. DUKE: I'd better look at it, your Honor.

THE COURT: I don't think it is important but when you get a chance I think you will find I am correct about it.

MR. DUKE: With respect to the evidence in all the cases, including the two cases on which I offered or planned to offer the transcripts on, all the cases, all the evidence shows a period of activity beginning in April of 1971 and ending in February of 1972, a period of ten months.

What we are talking about here is sentencing a man who during a period of relative youth engaged in narcotics transactions for a period of ten months or thereabouts.

And all I would add is this: he already has 20

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years for that ten month period. When we talk about five years or ten years or 15 years, we are talking about 25 or 30 or 35 and we are talking about 35 and 40, we are talking about a lifetime.

It is just inconceivable to me that it is appropriate to sentence a man to an actual life term for a period of narcotics activities covering a period of approximately ten months.

Therefore, I would urge that there be some reason on the record for any sentence that is imposed upon Mr. Pacelli in addition to the 20 years he already has. I am not saying that it cannot be done but it seems to me that this is a case in which it is appropriate to put on the record specific reasons or findings which an appellate court could say justifies the extreme kind of sentence that is being contemplated.

THE COURT: I know of no procedure or authority or precedent or even reason except those expressed in some educational quarters for making findings in respect of a sentence. I think it would paralyze the discretion which is vested in the Court and until a new procedure is developed through legislation, if any, whereby sentences are to be reviewed on their facts, I think that the course of the sentence should follow the tradition rather than a method

that has not yet been accepted.

I see no basis at all for makings findings you request and for a large number of reasons that are irrelevant at the present time, it would be inappropriate.

As far as the availability of the probation reports, you may not know it but in the event that the Court of Appeals, Second Circuit, should have occasionto want to inform itself of the contents of a probation report, it does and I think it has in the past simply communicated with the probation department, which is separate and apart from the district court, with a request for a view of the probation report.

I have never heard of making such a report available in the clerk's office with or without a seal. For obvious reasons those reports have an aura of confidentiality about them, except to the extent that they are made available to defendant's counsel, sometimes also to the government if the defense counsel has seen them.

You have seen the report. To try to mount a legal argument on the basis of what some social inquiry officer writes in his report and to suggest that that represents the thinking of the judge and the basis on which he operates, is just a complete exercise in futility; just nothing to that.

So I am sure that if the Court of Appeals in this or any other case wants to get a probation report, there are simple methods and direct methods of doing so without incarcerating the report in a place where it could through accident or otherwise become public property. You have seen it, that is enough. If the Court of Appeals wants to see it they can get it. I don't even know whether the government saw the report.

MR. LAVIN: No, your Honor.

THE COURT: Is there anything else you want to say before I impose sentence?

MR. DUKE: I don't know if it is necessary before or whether it can be done after, but, your Honor, I left with your secretary two transcripts which I would request be marked and made a part of the record in this proceeding. They are transcripts for Lipsky's testimony in 664 and 1319.

THE COURT: Are these transcripts records otherwise in the courthouse and available to the Court?

MR. DUKE: Yes, but, your Honor, when you get up to the Court of Appeals, you have a dickens of a time going into the records from other cases and it is just a lot simpler if they could be marked as part of this record and there is no motion --

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THE COURT: But what you are asking me to do in effect is to make an examination of these papers and give you a certificate that you have put papers before me correctly. Why should I go through this exercise?

MR. DUKE: Well, your Honor, it is as if it were an exhibit to one of my motions. Obviously if the government wishes to challenge the authenticity --

THE COURT: You can't throw the burden on other people for doing your work. I will not say that these are accurate or complete papers. If you want papers filed you can have them filed but these do not represent as far as I am concerned what they purport to represent because I haven't examined them.

MR. DUKE: I understand that. I am not asking your Honor to make a finding concerning these documents, just let me mark them. For the record, I will offer them for your Honor for whatever they are worth.

THE COURT: All right, I reject them for whatever they are worth and they are marked for identification.

MR. DUKE: Thank you.

THE COURT: Now, you have also submitted a memorandum on the sentencing and I will mark that likewise without reflecting on its propriety or its accuracy or completeness. I make no finding whatever on that subject and don't

intend to go through these page by page to find out whether you have copied them correctly and whether they are complete and whether there is something else that has to be done.

But I have read them to see if there is anything in there that properly should be considered by me for the purposes of sentencing and to that extent I have observed what you said in them.

Also, I have Mr. Lavin's reply affidavit which I have read, and, again, I don't make any statement about whether he has given me the indictments that are official indictments. I am just not going to get into that. I don't think it is part of my function in this proceeding.

I have also gone back over your motion to dismiss the indictment which you filed back on December 4, 1973, where I think that you made that a part of what you were telling me today as to the connection of the three indictments, if any, so that that will go back into the files also.

Now, Mr. Pacelli, is there anything you want to say?

MR. DUKE: Excuse me, your Honor. May I make one other observation? With respect to our claims about the agreement that was entered, put on the record in 1319, we have an affidavit from Mr. Pacelli concerning his understanding of what that agreement is and as far as I know there

is nothing in Mr. Lavin's affidavit referring to the understanding of any of the parties to that agreement.

I think the fact of the agreement to include a 15 year sentence is crystal clear. I don't really see what factual issues are raised but if there is any factual issue about what that agreement means or if the Court of Appeals thinks there is any merit to the government's position, its opposition to our claims, then it seems to me that this has come down to a contract case and the negotiations between the direct participants would become relevant because obviously the negotiations themselves are not on the record, their understanding.

B 5 Therefore, what I am suggesting is that if the Court doesn't feel that we have made a clear case that this agreement obtains and limits the Court, then I think it would be appropriate to have an evidentiary hearing and subpoena in Mr. Morvillo and Mr. Feffer and whoever else participated in those negotiations, to tell if they have a memorandum of those negotiations, to make the record quite clear on what the understanding was or wasn't, if there is any doubt that the understanding is what we claim it is.

THE COURT: I have no doubt as to the scope of the understanding. Neither have I any doubt that the present indictment is not the same as the previous indictments to

which you have referred; nor do I have any doubt that the agreement before Judge Gagliardi does not seem to apply.

Moreover, I question whether any agreement such as Mr. Morvillo made is legally binding on this Court's sentencing function in this case.

In that climate I think it was well for you to put your foot forward in another direction which carries greater conviction to my mind even if I be wrong on what I have just said and that is I am now persuaded, as I was not persuaded two weeks ago, that this defendant appears before me not in the guise of a technical second offender and, secondly, that I did not give due consideration as I since have to the comparative sentences in this case; considering the comparative guilt of the defendant in this case and the circumstances that pertained to the sentencing function.

It is for that reason that I do not expect to impose a 45 year sentence on Mr. Pacelli which as you have ocrrectly observed is the maximum that I could impose here. So we lay that to one side.

Is there anything you want to say, Mr. Pacelli, in your own behalf?

THE DEFENDANT: Yes.

Your Honor, I know it is a waste of time to pro-

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test my innocence or even to ask for compassion or mercy, and tell you that my trial was unfair. Forget about that.

I only want to say something about the crimes committed in the courtroom and say something that puzzled me very much.

As a federal judge you are sworn to uphold the law. When it is proved to you that an Assistant United States Attorney has committed a crime in the courtroom, or when a government witness has committed perjury, isn't it your duty to demand an investigation and to take action? If not, the courts are corrupted and justice is impossible, the court seems to condone crimes and perjury.

In the course of this trial, as well as in my last trial before you, you saw and heard proof that Barry Lipsky got immunity for all his crimes. For his murder, his narcotics, his shylocking, his tax evasion and his perjury. You also saw and heard proof that Assistant United States Attorneys Feffer and Gross, in previous trials, had Lipsky lie that he had received no deal whatsoever. You also saw proof that Feffer had Lipsky lie to the grand jury and to federal agents that he had no deal.

How can Feffer continue to be a federal prosecutor? How can he continue to be a lawyer? Why isn't he in jail for suborning perjury and obstruction of justice? Why haven't

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you, Judge, done something about it?

You said on February 26th that you don't condone perjury. Yet you heard Conforti swear that he had conversations with a dead man, and you wouldn't let us tell the jury about that perjury. Didn't in fact you condone Conforti's perjury?

You heard Susan Weyl swear that she hadn't taken any pills or dope for months, yet you saw her on the stand. You saw she was taking pills, you saw her lie. Have you done anything about that? Have you done anything about Conforti's perjury? Have you done anything about the government lawyers who let these witnesses lie?

The newspapers tell us every day that Nixon obstructed justice if he knew about the crimes and didn't tell the FBI and the Justice Department and demand prosecution. How different is what happened here? There is clear proof in the record that the federal prosecutors aided and abetted the perjury of Lipsky. There are grounds to inquire about their participation in the perjury of Conforti and Susan Weyl. Have you as the judge reported these crimes to the FBI or demanded any investigation? Have you reported Feffer to the Bar Association? There is no if here.

The tapes between Gwinn, Feffer and Lipsky were offered in evidence. In them Feffer tells Gwinn he controls

the judge. He is talking about you, your Honor. If that isn't true, how does Feffer get away with it? Why don't you investigate these claims? I wonder why.

In the same tapes Feffer conspires with Gwinn to submit phony affidavits to the Court and to pass Lipsky off as a defendant and not as an informer. You have seen this evidence. Why hasn't anything been done? And this is the same man who made the case against me.

I feel that this should be brought to your attention, it is my duty as a citizen to do so. Never mind that my life has been destroyed by a pattern of perjury and obstruction of justice. Where is justice for anybody?

THE COURT: Anything else you want to say?

THE DEFENDANT: That is all, your Honor.

THE COURT: Mr. Lavin, anything you want to say?

MR. LAVIN: No, your Honor.

B6 THE COURT: Based on the independent consideration I have given to this matter, independent of anything that has gone before, and relative only to the case and the people before me, I am satisfied that the judgment herein should be and hereby adjudge that this sentence shall be consecutive to the sentence of the defendant in this court imposed on April 22nd, 1972 under Indictment 71 Crim. 614 being served and after that sentence has been completed, the defendant be

committed under the indictment herein, 73 Crim. 881, to the custody of the Attorney General or his authorized representative for a term of 15 years on each of Counts 1, 2 and 6 to run concurrently and he is fined the sum of $25,000 on each of said Counts 1, 2 and 6 for total fines of $75,000 and they are committed fines.

Pursuant to Title 21, Section 821 of the United States Code a period of special parole of three years on each of Counts 1, 2 and 6 shall follow commitment under the sentence pursuant to this indictment.

Under Title 28 of United States Code, Section 1918, this Court orders that the defendant pay the costs of the prosecution of this case, 73 Crim. 881, in an amount to be determined according to due process of law.

The defendant is remanded.

MR. DUKE: Your Honor, maybe it is immaterial but I understand the previous sentence was May 22nd and I believe your Honor said April 22nd, 1972.

THE COURT: Did I say April? I have 5/22/72. It is May 22nd. I have the date down as 5/22. It is May 22.

That concludes the matter.

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CERTIFICATE OF SERVICE

I, Steven Duke, a member of the bar of the Court, served a copy of Appellant Pacelli's brief and his appendix on the Appellee by mailing same to Paul Curran, United States Attorney, Southern District of New York, Federal Court House, Foley Square, New York, N.Y., first class, on June 5, 1974.

Steven Duke

Steven Duke